***United States Court of Appeals***

***for the***

***District of Columbia Circuit***

# TRANSCRIPT OF RECORD

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IN THE

UNITED STATES COURT OF APPEALS FOR THE

DISTRICT OF COLUMBIA CIRCUIT

No. 19,988

ROY J. IRBY, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

# BRIEF FOR APPELLANT



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## INDEX AND TABLE OF CASES

### Subject Index



### CASES CITED

## STATUTES CITED



* Authorities chiefly relied upon.

## STATEMENT OF QUESTION PRESENTED

The question is whether consecutive terms of imprisonment can legally be imposed by the sentencing court for the statutory offenses of housebreaking and robbery when each arises during the course of a single criminal transaction.

IN THE

UNITED STATES COURT OF APPEALS FOR THE

DISTRICT OF COLUMBIA CIRCUIT

No. 19,988

ROY J. IRBY, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

BRIEF FOR APPELLANT

## JURISDICTIONAL STATEMENT

This appeal is from a judgment and order by the district court on January 20, 1966 denying appellant's petition for relief filed pursuant to 28 U.S.C. §2255. An opinion stating the court's findings of fact and conclusions of law thereon was filed on December 24, 1965. Jurisdiction of this Court to hear the appeal is based upon 28 U.S.C. §1291.

## STATEMENT OF THE CASE

Appellant broke into the home of another with the intent to rob the occupant and in fact did rob the occupant (Opin. S. 1).[1/] Following his apprehension and indictment, he entered pleas of guilty to counts of an indictment charging housebreaking and robbery (D.C. Code § 22-1801 (1961) and D. C. Code § 22-2901 (1961). Thereafter, appellant was sentenced to consecutive terms of imprisonment of from two to eight years for the offense of housebreaking and from four to twelve years for the offense of robbery (Opin. S. 1 and 2). Appellant's maximum sentence exceeds by five years the permissible maximum sentence for robbery, the greater of the two offenses. Appellant had completed his term of imprisonment for the offense of housebreaking at the time he filed his petition pursuant to 28 U.S.C. § 2255. [2/]

Before the district court appellant contended that he could not legally be sentenced to consecutive terms of imprisonment for different offenses arising from a single transaction and that as a matter of law, his second sentence was prima facie illegal (Opin. S. 2). In a lengthy opinion and judgment, the district court rejected appellant's petition. This appeal followed.

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1/ All references to sheets in the opinion of the district court of December 24, 1965, are hereinafter cited as "Opin. S."

2/ Stipulation between counsel for petitioner and Assistant U. S. Attorney, dated December 22, 1965.

## STATUTES INVOLVED

D. C. Code Title 22 - Section 1801. Housebreaking.

Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years (Mar. 2, 1901, 31 Stat. 1323, ch 854, § 823).

* * *

D. C. Code Title 22, Section 2901. Robbery.

Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years. (Mar. 3, 1901, 31 Stat. 1322, ch 854, § 810).

## STATEMENTS OF POINTS

The district court erred in upholding the legality of consecutive sentences by attributing to Congress an intent, tacit or otherwise, to pyramid the penalties for housebreaking and robbery when the offenses occur as parts of a single criminal transaction.

## SUMMARY OF ARGUMENT

A. In cases which involve a single transaction, but multiple and separate criminal offenses, this Court has held that consecutive terms of punishment are legal only in situations where it is clear that Congress intended to sanction multiple and consecutive punishment. Davenport v. United States, No. 18583 (D.C. Cir., Nov. 10, 1965); Ingram v. United States, No. 18568 (D.C. Cir., Nov. 4., 1965).

B. In the absence of any explicit Congressional intent on the propriety of consecutive sentences, courts adopt a lenient construction of Congressional enactments in favor of single punishment. Prince v. United States, 352 U.S. 322 (1957); Heflin v. United States, 358 U.S. 415 (1959); Davenport v. United States, supra.

C. During the period when Congress codified the District of Columbia Code, the dominant attitude in the federal judiciary condemned consecutive sentences for the offenses of housebreaking and robbery when they arose in the course of a single transaction. Halligan v. Wayne, 179 Fed. 112 (6th Cir. 1910); Munson v. McClaughry, 198 Fed. 72 (8th Cir. 1912).

Congressional and judicial resolution of the question of appropriate punishment for serial or multiple offense transactions similar to the instant one, following the codification of the D.C. Code in 1901 3/ have, with the exception of offenses related to narcotics, rejected consecutive punishments. Prince v. United States, supra; Ingram v. United States, supra, Bell v. United States, 349 U.S. 81 (1955).

## ARGUMENT

### I. BECAUSE CONGRESS NEVER INTENDED COURTS TO IMPOSE CONSECUTIVE SENTENCES FOR THE OFFENSES OF HOUSEBREAKING AND ROBBERY WHEN PARTS OF ONE TRANSACTION, THE DISTRICT JUDGE ERRED IN HOLDING THAT CONSECUTIVE SENTENCES WERE LEGAL.

The sole issue posed by the instant appeal is whether appellant Irby received a legal sentence when he was given consecutive terms of imprisonment for the offenses of housebreaking and robbery when they occurred as integrally related parts of a single coherent transaction. Appellant contends that in accordance with the determinative standards announced by the Supreme Court his consecutive sentences were illegal.

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3/ 1 D. C. Code Annotated IX-XIV (1961).

A. THE LAW ON CONSECUTIVE SENTENCING

In a recent series of decisions both the Supreme Court and this Court have succinctly formulated the applicable principles to determine whether consecutive punishments may legally be imposed for a transaction which results in the violation of more than one statute:

> "As we understand the approach of the Supreme Court to the problem presented by this case, the statutes are first examined to ascertain if they will bear interpretation as creating separate offenses. If so, the court then inquires whether Congress also intended to 'pyramid the penalties' Prince v. United States 352 U.S. 322, 327 (1957), or only to establish a different degree or type of offense." Ingram v. United States, supra,at 2.

Where as here, when there is no question that there are two distinct offenses arising from the single transaction, the appropriateness and legality of consecutive punishment "depends on the intention of Congress." Davenport v. United States, supra, at 3.

B. WHERE THE CONGRESS FAILS TO SPECIFY ITS INTENT, CONSECUTIVE SENTENCES ARE ILLEGAL.

An examination of the language and the history of the two statutes involved in this case, Sections 1801 and 2901 of Title 22 of the D. C. Code prove wholly inconclusive in divining Congressional intent with respect to sentencing. As recited in the opinion of the district court, Congress merely enacted these two sections along with numerous others when they codified the law for the District of Columbia. (Opin. S. 10) In the absence of specified Congressional intent, courts justly conclude that Congress intended that a policy of lenity should prevail in meting out punishment. Davenport v. United States, supra; Ingram v. United

States, supra; Prince v. United States, supra; Heflin v. United States, supra; Ladner v. United States, 358 U.S. 169 (1958); Bell v. United States, supra.

The judicial policy, expressed in these decisions, clearly provides that, barring an explicit Congressional directive, courts will not impose consecutive sentences in the belief that it is "a pre-supposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment." Bell v. United States, supra, at 83.

C. ANY INTENT ATTRIBUTED TO CONGRESS SHOULD REJECT CONSECUTIVE SENTENCES.

Despite finding an absence of any explicit intention on the part of Congress, the district court found that there could be "attributed 'to Congress a tacit purpose'" to permit consecutive sentences. (Opin. S. 10). This "tacit purpose" which the district court detected seems to be gathered entirely from the opinion of the Supreme Court in Callanan v. United States, 364 U.S. 587 (1961) and not from any action of the Congress. The Callanan case involved the legality of consecutive sentences for both a substantive offense as well as the conspiracy to commit the offense under the Hobbs Anti-Racketeering Act. 18 U.S.C. §1951, a statute enacted only after extensive Congressional consideration on its penal provisions.

In affirming the legality of consecutive sentences thereunder, the closely divided court relied heavily on the legislative history as well as the long standing legislative policy to deal severely with offenses which were committed by groups. Neither of these elements exists in connection with the instant case, and the approach of Justice Frankfurter in Callanan is wholly inapplicable here.

Moreover, if a purpose were to be attributed to the legislature, it is more than likely that it would be in support of single punishment. During the period when these offenses were codified, the prevailing attitude in the federal courts held that consecutive sentences could not be imposed in a situation like that presented here. If as the district court and Callanan suggest that "Congress is, after all, not a body of laymen unfamiliar with the commonplaces of our law," (Opin. S. 9), it is more than likely that Congress was familiar with the fact that there had historically existed a division of opinion in the state courts on whether consecutive sentences were legal for the offenses of housebreaking and robbery when committed in the course of a single transaction, that eminent criminal commentators considered decisions finding consecutive punishments to be illegal, to be the

better view, [4] and that many federal courts concurred with the "better view."

In Halligan v. Wayne, supra, appellant had been sentenced consecutively for the offenses of burglary and larceny. The court, after an extensive review of the law concluded:

> "Still to make a burglary thus double, and punish it twice, first as a burglary and secondly as a larceny, hardly accords with the humane policy of our law, and we have cases which refuse this double punishment.
>
> * * *
>
> These views we think, are sustained by the weight of reason and authority." (10 state citations omitted) p. 114.

In Munson v. McClaughry, supra, appellant had been consecutively sentenced for the crimes of breaking and entering, and larceny. In finding consecutive sentences beyond the jurisdiction of the court it was concluded:

> "It seems unauthorized, inhumane, and unreasonable to divide such a single intent and such a criminal act into two or more separate offenses, and to inflict separate punishments upon the various steps in the act or transaction, such as one for breaking, or for the attempt to break with the criminal intent and another for a larceny with the same intent, or such as one for the attempt to break, a second for the breaking, a third for the entering, a fourth for the taking of stamps, a fifth for the taking

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4/ Bishop, Criminal Law, 9th ed., (1923), § 1060.

> of other property, a sixth for the conversion of the property, and a seventh for carrying it away, all with the same criminal intent. And there is evidently no limit to the number of offenses into which a single criminal transaction inspired by a single criminal intent may be divided, if this rule of division and punishment is firmly established." p. 74.

On the few occasions which Congress has had occasion to deal with crimes related to those with which appellant is charged, the courts have determined that either Congress did not intend consecutive sentences or that in the absence of intent, courts should not presume a policy of harshness. Thus in Prince v. United States, supra, it was held that consecutive sentences could not be imposed for breaking into a bank and for robbing the bank after breaking.

The same result should obtain here. To conclude otherwise is to impute to Congress an intention to erect varying policies of protection as between banks and other edifices--to treat store and house robbers more severely than bank robbers. Clearly Congress had no such irrational plan. And the reasoning prohibiting consecutive sentences for breaking into a bank and robbing it should be equally applicable to offenses in connection with other buildings.

The dissenting opinion of Judge Burger in Ingram, supra, at 10 suggests sound reasoning on why Congress would reject consecutive punishments in this situation:

> ". . .the distinction between entrance with intent to rob and the actual robbery is a good deal narrower than that between assault with intent to kill and assault with a dangerous weapon since there will be very few cases where the intruder enters without already having the intent to rob, thus making the entrance with that intent a lesser included offense of the robbery itself."
>
> As the court summarized in Ingram, supra, at 5:
>
> ". . .The Court has looked in each case to the behavior against which the statute was directed and to the intent of Congress. It has found justification for consecutive sentences only in the narcotics area. In other instances merger, lack of explicit intent and a policy of lenity have been held in varying combinations to preclude consecutive sentences." 5/

If in the total absence of any specific Congressional intent, a court nevertheless seeks to attribute a "tacit" intent to Congress, the more probable intent would be not to punish consecutively, but to adhere to the better view as formulated by text writers and stated by Justice Douglas in his dissenting opinion in Gore v. United States, 357 U.S. 386 (1958).

> ". . .I agree with Bishop: '. . .in principle and by the better judicial view, while the legislature may pronounce as many combinations of things as it pleases criminal resulting not infrequently in a plurality of crimes in one transaction or even in one act, for any one of which there may be a conviction withour regard to the others, it is, in the language of Cockburn, C. J.' a fundamental rule of law that out of the same facts a series of charges shall not be preferred.'" (Criminal Law (9th ed. 1923) §1060.)

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5/ In Morgan v. Devine, 237 U.S. 632 (1915), the Court did find that consecutive sentences were permissible for both the breaking into a post office and the taking of mail. However, that decision relies heavily on the Court's earlier decision in Gavieres v. United States, 220 U.S. 338 (1911), a case arising in the Philippines. In Green v. United States, 355 U.S. 184 (1957), the Court emphasized the uniqueness of their Philippine decisions as dealing with "--a territory just recently conquered with long-established legal procedures that were alien to the common law." Green v. United States at 197.

## CONCLUSION

An analysis of the reasoning of the district court clearly shows that consecutive sentences were upheld in this case primarily on the basis that "What is involved here is a common instance of two different statutes defining two separate and unrelated offenses." (Opin. S. 11).

As this Court has repeatedly stated, the judiciary must proceed beyond the "different offense" test and probe the intent of Congress in determining whether consecutive sentences are legal. The Court below, upon finding no such intent rejected the policy of lenity which is a keystone of our jurisprudence, and instead elected to "attribute" an intent to Congress-an intent which appellant has demonstrated is not clearly supportable.

Under the authorities discussed in this brief, it is clear that where housebreaking and robbery occur as parts of a single transaction, there is no conclusive Congressional intent on the scope of the punishment and that courts should construe the enactments leniently.

For the foregoing reasons, the judgment denying the relief sought in appellant's motion should be reversed.

Respectfully submitted,

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In The

UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit



No. 19,988

ROY J. IRBY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

# SUPPLEMENTAL BRIEF FOR APPELLANT

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INDEX AND TABLE OF CASES

## Subject Index



## Cases Cited

In The

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---

No. 19,988

---

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SUPPLEMENTAL BRIEF FOR APPELLANT

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I

Preliminary Statement

This Court, by appropriate Order filed on May 17, 1967, vacated the judgment and opinions entered by a panel of the Court on March 15, 1967, in No. 19,988, Roy J. Irby v.

United States of America, and inter alia instituted the instant rehearing. Said Order additionally granted permission to Appellant Irby to file this Supplemental Brief.

The facts and the question before the Court may be stated with succinctness. All facts are gleaned from the indictment, since appellant pled guilty before the trial court. Irby entered the home of another with intent to steal property, and while in the home robbed an occupant of two rings. Out of this criminal episode the United States Attorney secured an indictment charging Irby with eight separate and distinct statutory offenses, carrying a total maximum penalty of 83 years in prison.[1/] Irby pled guilty to the offenses of housebreaking and robbery. The United States Attorney dismissed the balance of the counts. The trial court sentenced appellant to consecutive terms of imprisonment for each offense.

The question before the Court was concisely framed by a panel of the Court as follows:

> "The question, then, is whether the trial court could impose consecutive sentences for housebreaking and robbery when they are

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1/ 1. housebreaking (D.C. Code §22-1801, not more than 15 years); 2. attempted robbery (D.C. Code §22-2902, not more than 3 years); 3. robbery (D.C. Code §22-2901, not more than 15 years); 4,5,6 & 7. assault with a dangerous weapon (D.C. Code §22-502, not more than 10 years); 8. carrying a dangerous weapon (D.C. Code §22-3204, not more than 10 years)

committed during a continuous course of illicit activity."[2]

II

Supplemental Argument

A. Trial Courts Have No Inherent Power to Impose Consecutive Punishments for Multiple Statutory Offenses Which Arise in a Single Criminal Transaction.

The sole contention urged by appellant before the District Court, before a panel of this Court, and now before the full Court is that appellant's sentence for the offense of robbery is illegal because the Congress has not empowered federal courts to impose consecutive sentences for the convictions of housebreaking and robbery when these offenses take place in a single transaction such as here involved.

A basic tenet to the separation of powers is the exclusive right of the Congress to define both criminal activity and its punishment.[3] In renewed recognition of this dichotomy, numerous recent decisions by both the Supreme Court

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2/ Slip opinion at page 3

3/ Hackfield and Company v. United States, 197 U.S. 442, 450 (1905); United States v. Wiltberger, 18 U.S. 76, 92 (1820): "The rule that penal laws are to be construed strictly is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of

and this Court have articulated with clarity the jurisprudential mechanics whereby federal courts are to determine whether they may legally impose consecutive sentences in cases where several distinct statutory offenses occur in the course of a single criminal transaction. 4/ The Ingram Case provides a good formulation:

> "As we understand the approach of the Supreme Court to the problem presented by this case the statutes are first examined to ascertain if they will bear interpretation as creating separate offenses. If so the court then inquires whether Congress also intended to pyramid the penalties." 353 Fed.2nd at 873

The acute awareness of the focal role which the legislature has in defining the dimensions of punishment, which the foregoing cases reflect, is in stark contrast to the incomplete approach which was temporarily prevalent in the federal court system. This latter approach is typified by Ebeling v. Morgan, 237 U.S. 625 (1915) and Morgan v. Devine,

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3/(continued) individuals, and on the plain principle that the power of punishment is vested in the legislative, not in the judicial, department. It is the legislative, not the court, which is to define a crime and ordain its punishment."

4/ Bell v. United States, 349 U.S. 81 (1955); Prince v. United States, 352 U.S. 322 (1957); Gore v. United States, 357 U.S. 386 (1958); Ladner v. United States, 358 U.S. 169 (1958); Ingram v. United States, ___ U.S. App. D.C. ____ 353 F.2d 872 (1965).

237 U.S. 632 (1915). These cases rest solely on the separate offense test. If the evidence arising out of a single criminal transaction was sufficient to establish offenses against more than one statute, then it was concluded that multiple convictions and punishments were proper. These decisions, while examining the question of Congressional intent on multiple convictions, give no consideration to the equally-important issue of multiple punishments. Ingram, supra; Prince, supra; and Gore, supra, clearly establish the fact that Congress must have intended multiple punishments as well as convictions.

B. The Trial Court Had No Power to Consecutively Sentence Appellant for the Offenses of Housebreaking and Robbery.

The housebreaking and robbery statutes here involved admittedly create separate offenses and the trial court properly so found. In its inquiry into the permissible range of punishment, however, the court committed reversible error. Appellant vigorously urged before the trial court that it had a legitimate, indeed a mandatory obligation, to determine whether Congress had intended it to consecutively sentence Irby, once having established the validity of the separate convictions. Numerous factors obtain in this case which must create doubt on the part of the court as to the scope of its power to inflict punishment and compel it to look for legislative direction.

Manifest evidence of the trial court's doubt and recognition of its duty to look to Congress is reflected in its Order of June 17, 1965, wherein the trial court recited its belief that the issue before it in No. 668-65 (Irby) [5/] was "identical" to the issues then pending before this Court in Ingram and United States v. Davenport, 122 U.S. App. D.C. 344, 353 F.2d 882 (1965). If nothing else, this Order demonstrates with probity the fact that, insofar as the trial court was concerned, it had no easy answer for Irby's motion. [6/]

Indeed, no other attitude was possible, since appellant raised numerous arguments which questioned the power of the court and presumably additional factors were known to the court. The very fact that appellant's indictment carried a potential sentence of 83 years for robbing a woman of two

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5/ Irby v. United States, 250 F. Supp. 983 (D.D.C. 1965)

6/ Appellant is firmly convinced that the inter-relationship between the trial court's action in No. 668-65 and this Court's action in Ingram offers a rare and tangible manifestation of the existence of real doubt as to Congressional intention, the demonstration of which lies at the heart of appellant's burden. While the trial court saw an identity between Irby and Ingram, but elected ultimately to distinguish Ingram, the dissenting judge in Ingram apparently felt that a case like Irby's ("entrance with intent to rob and the actual robbery") made out a better case for the rule of lenity than Ingram's. The significance of this episode lies not in divining which judge was right, but rather that the facts of appellant's case and the application of the law thereto create a bona fide doubt,

rings in her home itself was sufficient to raise a real question as to whether Congress had empowered the courts to pyramid penalties for offenses closely related and commonly occurring in a single episode. The existence of two statutory offenses is hardly determinative that the Congress intended each to be separately punishable when both are committed in a single transaction.

Appellant submits that it is eminently reasonable to conclude, and just as likely, that Congress intended only to provide additional avenues of prosecution. In fact, this is the very attitude explicitly expressed by at least one state legislature. Section 1938 of the New York Penal Law provides in full as follows:

> "An act or omission which is made criminal and punishable in different ways, by different provisions of law, may be punished under any one of those provisions, but not under more than one; and a conviction or acquittal under one bars a prosecution for the same act or omission under any other provision."

People ex rel Thornwell v. Heacox, 231 App. Div. 617 247 N.Y.S. 464 (1931), holds that this provision is equally applicable to "acts comprising one transaction". In

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6/(continued) and a reasonable difference of opinion as to the proper legal solution - the necessary ingredient for application of the rule of lenity.

other states where no such enactments exist, the courts have nevertheless concluded that in the absence of legislative guidance, consecutive sentences in multiple offense-single transaction cases are improper. 7/

A somewhat similar spirit is reflected in Section 22 of the Model Sentencing Act, which suggests:

> "Separate sentences of commitment imposed on a defendant for two or more crimes constituting a single criminal episode shall run concurrently."

In this regard, this very Court raised serious doubt more than ten years ago on the power of trial courts to pyramid penalties. In Evans v. United States, 93 U.S. App. D.C. 123, 232 F.2d 379 (1956), the Court opined:

> "The same act may at times constitute two offenses and justify findings of guilty on two counts, and separate sentences may be imposed, providing they run concurrently ... A different result would probably be necessary if the sentences had been imposed to run consecutively."

Certainly the historical relationship between house-breaking and robbery, while admittedly confused, tends to confirm the dubious posture of judicial powers with respect to sentencing for these offenses. Particularly significant is

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7/ People v. Stingley, 414 Ill. 398, 111 N.E. 2d 548 (1953); In re Allison, 332 Mich. 49, 33 N.W. 2d 917 (1948).

the fact that around the time that Congress codified the common law crimes for the District of Columbia, several highly-persuasive decisions condemned consecutive sentencing in situations such as that involved here.[8/]

Considerations such as the foregoing are clearly sufficient to raise a very real question to a federal trial court as to its sentencing power in this situation. Where state legislatures, state courts, drafters of model penal legislation, and certain federal courts have all paused to ponder this problem, and many have concluded that consecutive sentencing is improper, a persuasive case is made that the federal Congress too may very well have been opposed to consecutive sentencing.

In evaluating Congressional intent with respect to similar problems, the Supreme Court has provided definitive guidance. If the legislative history is unclear, inconclusive or non-existent, the trial court must resolve its doubt in favor of lenity and against the imposition of a harsher punishment.[9/]

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8/ see Halligan v. Wayne, 179 Fed. 112 (6th Cir. 1910); Munson v. McClaughry, 198 Fed. 72 (8th Cir. 1912), discussed at p.p. 11 & 12 of Appellant's Brief.

9/ Bell v. United States, 349 U.S. 81 (1955); Ladner v. United States, 358 U.S. 169 (1958).

> "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." Bell v. United States, supra, at 83

The trial court, having ascertained that the legislative history of the instant statutes was inconclusive, chose not to follow the rule of lenity; but in the admitted absence of explicit intent elected to attribute a tacit intent to Congress. Appellant submits that on this record the interpolation of the trial court amounts to a usurpation of the legislative prerogative. In its process of attribution, the trial court relied heavily on the decision of the Supreme Court in Callanan v. United States, 364 U.S. 587 (1961). Appellant submits that the trial court's reliance is misplaced in two respects. The Supreme Court has pointedly cautioned against trying to resolve problems in this area by "color-matching".:

> "...it will not promote guiding analysis to indulge in what might be called the color-matching of prior decisions concerned with 'the unit of prosecution' in order to determine how near or how far from the problem under this statute the answers are that have been given under other statutes." Bell v. United States, supra, at 82

The wisdom of Justice Frankfurter's admonition is acutely demonstrated in the trial court's misuse of Callanan. Callanan involved consecutive sentences for a substantive offense and the conspiracy to commit the offense. Frankfurter, in stressing the distinction between conspiracy and the substantive offense, found it to be "a postulate of our law", a "long established distinction", and a manifestation of a policy to deter "partnership in crime". Appellant has shown that there is certainly no such clear-cut distinction between housebreaking and robbery and that, far from being a "postulate of our law", a substantial body of authority rejects any distinction in cases such as appellant's.

Appellant contends that the trial court, in basing its decision on speculation as to what Congress might have had in mind, exceeded its jurisdiction. Appellant is not unmindful of the fact that once one embarks on guestimates as to what might be, that convincing cases can be made out for and against appellant's position. Yet, this very fact dictates invocation of the rule of lenity. In Bell, the Court acknowledged that "argumentative skill ... could persuasively and not unreasonably reach either of the conflicting constructions", while Chief Justice Warren in Prince

readily agreed that "reasonable minds might differ" on the Court's conclusion. But it is the existence of this very symptom which brings the rule of lenity into play and compels its application.

In the absence of explicit Congressional intent, there is no room for judicial discretion in this area. Discretion by definition is an uncertain power and for trial courts to assume that they have discretion in an area so vital to the rights of the convicted is unwarranted. This is especially so in light of the fact that the Congress has specifically granted the courts great discretion in determining the length of every sentence. The robbery provision of the D. C. Code specifically authorizes courts to formulate punishment for a period between 6 months and 15 years. Who is to say that this vast breadth of discretion was not intended by Congress to accommodate situations such as here involved.[10/] Were Irby sentenced to 15 years in prison for robbery, surely the interests of society and justice would

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10/ In Harrison v. United States, 7 F.2d 259, 263 (2nd Cir. 1925), the court stated:

> "it appears to us that the maximum sentence prescribed by Congress is intended to cover the whole substantive offense in its extremest degree no matter in how many different ways a draughtsman may plead it ... "

be fully and legally vindicated. Contrast this clearly legal approach with Irby's wholly arbitrary sentence of 2 to 8 years for housebreaking and 4 to 12 years for robbery. Irby could serve 5 years more than the maximum for robbery or 9 years less than the maximum. Appellant submits that this arbitrary and aberrant punishment, based on inferred discretion, and purportedly unreviewable by this Court, clearly exceeds the permissible scope of judicial authority.

## III

## Conclusion

Appellant has demonstrated that the proper application of the penal provisions for the offenses of housebreaking and robbery, when committed in the course of a single criminal transaction, has historically been a matter of real concern to courts, legislatures, and legal commentators, in fact, to all concerned with the administration of justice. As the spokesman for all the people, the federal Congress must by definition be held to also possess this same concern. Where is is reasonable to conclude, as here, that the Congress is concerned over a problem exclusively within its jurisdiction and when, as here, a widespread divergence of opinion exists, the trial

court committed reversible error in attributing a tacit intent to Congress. The Supreme Court has made clear that speculation of this type exceeds judicial jurisdiction and that the rule of lenity must be invoked.

For the foregoing reasons, the judgment denying the relief sought in appellant's motion should be reversed.

Respectfully Submitted,

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District Court)

June 26, 1967

BRIEF FOR APPELLEE

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 19,988

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ROY J. IRBY, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

---

**Appeal from the United States District Court for the District of Columbia**



DAVID G. BRESS,
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C.A. No. 668-65

## QUESTION PRESENTED

In the opinion of the appellee, the following question is presented:

Where in the course of a single criminal transaction a person commits *seriatim* two or more legally and historically distinct criminal offenses, may the sentencing judge, in his discretion, direct otherwise legitimate sentences to run consecutively?

## INDEX



## TABLE OF CASES



* Cases chiefly relied upon are marked by asterisks.

# United States Court of Appeals

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---

No. 19,988

---

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*v.*

UNITED STATES OF AMERICA, APPELLEE

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**Appeal from the United States District Court for the District of Columbia**

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## BRIEF FOR APPELLEE

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### COUNTERSTATEMENT OF THE CASE

On April 28, 1958, in Criminal Case No. 410-58, a nine-count indictment was filed in the District Court, charging appellant with one count of housebreaking, one count of robbery, one count of attempted robbery, four counts of assault with a dangerous weapon, and one count of carrying a dangerous weapon, all arising out of events which occurred on February 24, 1958. On June 6, 1958, after appellant had been certified competent to stand trial, he was arraigned and entered pleas of not guilty to all nine counts. However, on July 21, 1958, with his

counsel present, appellant in open court withdrew his pleas of not guilty and pled guilty to counts one and three in the indictment. Count One read as follows:

> On or about February 24, 1958, within the District of Columbia, George W. Foster and Roy J. Irby entered the dwelling of David J. Weltman and Claire G. Weltman, with intent to steal property of another.

Count Three charged:

> On or about February 24, 1958, within the District of Columbia, George W. Foster and Roy J. Irby, by force and violence and against resistance and by sudden and stealthy seizure and snatching and by putting in fear, stole and took from the person and from the immediate actual possession of Claire G. Weltman, property of Claire G. Weltman, of the value of about $2200.00, consisting of one fingerring of the value of $1400.00 and one fingerring of the value of $800.00.

The remaining counts of the indictment were dismissed. On July 25, appellant was sentenced by the court to imprisonment for two to eight years on the housebreaking count and four to twelve years on the robbery charge, the sentences to run consecutively.

On March 19, 1965, after completing his term of imprisonment for the housebreaking offense, appellant filed the instant petition in the District Court pursuant to 28 U.S.C. § 2255, challenging the legality of consecutive terms imposed for different offenses arising from a single transaction. After conducting a hearing on appellant's petition and taking the matter under advisement, the trial court, by memorandum opinion, denied the relief sought by appellant.[1] This appeal followed.

## STATUTES INVOLVED

Title 22, District of Columbia Code, Section 1801 provides:

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[1] *Irby* v. *United States*, 250 F.Supp. 983 (D.D.C. 1965).

> Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years.

Title 22, District of Columbia Code, Section 2901 provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

## SUMMARY OF ARGUMENT

The court below did not err in upholding consecutive sentences imposed upon appellant for housebreaking and robbery. Concededly, the offenses involved are legally and historically distinct crimes since each requires proof of an element not necessary to establish the other. While Congress has not expressly declared that cumulative punishment is permissible for violation of the housebreaking and robbery statutes, it has not indicated that under any circumstances should the penalties for violation of these statutes be restricted to alternative use. The fact that Congress was dealing with historically distinct crimes of an entirely different nature and placed them in unassociated sections of the Code is persuasive that it intended violation of each statute to be treated separately. There

is, therefore, no ambiguity in this regard calling for the application of the rule of lenity. Moreover, the fact that the offenses in question were committed *seriatim*, rather than arising out of the same act, presents a strong case for the application of a sound discretion by the sentencing judge in imposing consecutive sentences. This discretion was not abused in the instant case.

## ARGUMENT

**The court below did not err in upholding consecutive sentences imposed upon guilty pleas for housebreaking and robbery charges arising out of the same criminal transaction.**

Appellant's sole argument here is that the court below erred in ruling that the consecutive sentences imposed upon him for housebreaking and robbery were legal when the offenses arose out of a single criminal transaction. This contention is not persuasive.

In resolving the question of the propriety of imposing consecutive sentences upon conviction for two or more offenses arising out of the same criminal transaction, this Court has declared that its first duty is to examine the statutes involved to ascertain if they will bear interpretation as creating separate offenses. If so, an inquiry must then be made as to whether Congress intended to "pyramid the penalties" or only to establish a different degree or type of offense. *Ingram* v. *United States*, —— U.S. App. D.C. ——, 353 F.2d 872 (1965).

Appellant properly does not here assert that the offenses in questions are not legally distinct.[2] He says, however,

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[2] Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932). The housebreaking offense involved in the instant case required proof of the entry into the dwelling of the victims, an element not necessary for the robbery charge. On the other hand, the robbery count involved proof of a taking, in a particular manner, of something of value from the

that no Congressional intent can be discerned to permit cumulation of the penalties and invokes the rule of lenity in asking this Court to reverse the trial judge's ruling.

> But [the rule of lenity], as is true of any guide to statutory construction, only serves as an aid for resolving an ambiguity; it is not to be used to beget one. * * * The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers. That is not the function of the judiciary. *Callanan* v. *United States*, 364 U.S. 587, 596 (1961) (citation and footnote omitted).

The rule of lenity has been utilized, *in favorem libertatis*, where the statutes involved are unclear as to the appropriate unit of prosecution [3] or unclear as to whether cumulative penalties for several offenses arising out of a singly inspired transaction are permissible.[4] But there

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victim's person or immediate actual possession, proof not required for the housebreaking conviction. Appellant's concession that the offenses involved in the instant appeal are separate and distinct is, therefore intelligently made.

[3] The unit of prosecution may be unclear and the rule of lenity applied in cases where multiple offenses arise as a result of a single act affecting a single object, *Ingram* v. *United States*, *supra*, or where a single act affects multiple objects, *Ladner* v. *United States*, 358 U.S. 169 (1958); *Bell* v. *United States*, 349 U.S. 81 (1955), or where a single act affects a single object in more than one way *Davenport* v. *United States*, —— U.S. App. D.C. ——, 353 F.2d 882 (1965).

[4] Cases of this sort generally involve violations of different sections of one general act. In *Prince* v. *United States*, 352 U.S. 322 (1957), and *Heflin* v. *United States*, 358 U.S. 415 (1959), the Supreme Court had to meet the problem of whether various subsidiary provisions of the Federal Bank Robbery Act, 18 U.S.C. § 2113, which punished entering a bank with intent to commit robbery and possession of stolen property, merged when applied to a defendant who was also being prosecuted for the robbery itself. The rule of lenity was invoked to resolve the doubt with which Congress faced the court. These cases are limited to their facts since the Court there was dealing with a unique statute of narrow purpose and by

can be no question that the courts have the power to cumulate penalties for different offenses, even though they may proceed from a single act or transaction.[5]

In the instant case, like in *Callanan* v. *United States*, *supra* at 597, the offenses to which appellant pled guilty are codifications of two historically distinctive crimes composed of different elements. Robbery is historically an offense against the person, while housebreaking is an offense against the habitation. The legislative history of the codification of these crimes is devoid of any indication that Congress intended the penalties to be restricted to alternative use in any circumstances. It is clear on the faces of these statutes that Congress meant to cover two distinctive crimes and to provide penalties for the commission of each. There is, therefore, no room for the operation of the rule of lenity.

Finally, the instant offenses, unlike those in *Davenport* v. *United States*, *supra*, and *Ingram* v. *United States*, *supra*, principally relied on by appellant, did not arise out of the same act. In *Ingram* consecutive sentences for assault with a dangerous weapon and assault with intent to kill were imposed on conviction of charges arising out of a single assault. Similarly, in *Davenport* the appellant received consecutive sentences for manslaughter and assault with a dangerous weapon, again the result of a single assault. Here, however, like in *Cross* v. *United*

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which Congress intended to deal with a single problem. Compare *Morgan* v. *Devine*, 237 U.S. 632 (1915), where consecutive sentences for breaking into a post office and stealing government property therein were upheld.

[5] See *e.g.*, *Callanan* v. *United States*, *supra*; *Gore* v. *United States*, 357 U.S. 386 (1958); *Pereira* v. *United States*, 347 U.S. 1 (1954); *Blockburger* v. *United States*, *supra*; *Albrecht* v. *United States*, 273 U.S. 1 (1927); *Morgan* v. *Devine*, *supra*; *Ebeling* v. *Morgan*, 237 U.S. 625 (1915); *In re De Bara*, 179 U.S. 316 (1900); *In re Henry*, 123 U.S. 372 (1887); *Potter* v. *United States*, 317 F.2d 661 (8th Cir. 1963); *Shields* v. *United States*, 310 F.2d 709 (6th Cir. 1962). See also *Kendrick* v. *United States*, 99 U.S. App. D.C. 173, 238 F.2d 34 (1956) (upholding consecutive sentences for carrying a dangerous weapon and assault with a dangerous weapon).

*States*, —— U.S. App. D.C. ——, 354 F.2d 512 (1965),[6] the indisputably distinct offenses were committed *seriatim*, not simultaneously. The housebreaking offense was complete once appellant had entered the dwelling in question with intent to steal property therefrom. When he was confronted with his victims in the dwelling and robbed one of them, he committed an entirely separate offense. On these facts, the sentencing judge could, in his discretion, impose consecutive sentences for the offenses involved. He did not abuse his discretion in doing so. The court below did not, therefore, err in denying appellant the relief he sought.

## CONCLUSION

Wherefore, appellee respectfully submits that the judgment of the District Court be affirmed.

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*United States Attorneys.*

FRANK Q. NEBEKER,
EARL J. SILBERT,
CHARLES A. MAYS,
*Assistant United States Attorneys.*

[6] Consecutive sentences were upheld in *Cross* for housebreaking and assault with a dangerous weapon where, after the entry, the housebreakers forced a young woman found in the house at pistol point to serve as cover for their escape.

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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 19,988



ROY J. IRBY, Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

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Appeal from the United States District Court

for the District of Columbia

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# BRIEF OF AMICUS CURIAE

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(Appointed by this Court)

## INDEX



## AUTHORITIES CITED

Cases



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* Cases or other authorities chiefly relied upon are marked by asterisks.

Page

Statutes and Rules Cited



Books and Periodicals Cited

UNITED STATES COURT OF APPEALS

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ROY J. IRBY, Appellant,

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Appeal from the United States District Court

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# BRIEF OF AMICUS CURIAE

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This brief is filed pursuant to the order of this Court dated May 17, 1967, appointing the undersigned as amicus curiae for the purpose of filing a brief.*

* The assistance of James S. Campbell in the preparation of this brief is gratefully acknowledged.

## STATEMENT OF THE CASE

On April 28, 1958, a nine count indictment was returned in the District Court against Roy J. Irby and George W. Foster. The indictment charged appellant and Foster with one count of housebreaking, one count of robbery, one count of attempted robbery, and four counts of assault with a dangerous weapon. The eighth count charged Foster with carrying a dangerous weapon (a pistol) and the ninth count similarly charged appellant with carrying a crowbar. After examination at St. Elizabeths Hospital, appellant was found competent to stand trial.

On June 6, 1958, appellant entered a plea of not guilty to all counts. On July 21, 1958, appellant appeared in court with counsel, withdrew his plea of not guilty, and entered a plea of guilty to the counts of the indictment charging housebreaking and robbery. The proceedings (a transcript of which is attached as Appendix A) reflect the fact that the prosecutor had informed appellant's counsel that the remaining counts of the indictment involving appellant would be dismissed at the time of sentencing. These remaining six counts were described by the prosecutor as "counts which would be included in the others." Regarding each of the two counts to which appellant entered a plea of

guilty, the trial court addressed two questions to appellant: Did you do what the indictment charges? Do you want to plead guilty to that offense? To each such question appellant replied "Yes, sir." Appellant also answered affirmatively the court's two additional inquiries as to whether appellant was thoroughly satisfied with his representation in this matter and felt that he had been fully advised of his rights. After the Deputy Clerk took appellant's plea of guilty to the two counts, the court instructed that the matter be referred for pre-sentence investigation.

Four days later on July 25, 1958, appellant appeared with counsel for sentencing. The following exchange took place:

> THE COURT: "Mrs. Dwyer, do you wish to add anything to what you said in chambers?"
>
> MRS. DWYER: "No. At that time I indicated I did have a question about his mental capacity. I think we discussed that and I have nothing to add."
>
> THE COURT: "Do you wish to say anything before I pass sentence?"
>
> THE DEFENDANT: "No, sir."
>
> THE COURT: "You know you are guilty of a very serious offense and I have to accordingly pass a very serious sentence. You plead guilty to two counts. As to Count One, the sentence is two to eight years. As to Count Three, the sentence is four to twelve years, consecutive to Count One."

MR. O'MALLEY: "The government moves to dismiss the remaining counts as regards this defendant."

THE COURT: "Let them be dismissed."

On September 12, 1958, appellant made a motion for reduction of sentence, urging

> "that he entered a plea of guilty, saving the Court and prosecution the time and expense of prosecuting him; that no one was injured during the course of the crime for which he was sentenced; that neither his prior record nor the crime would seem to justify the sentence imposed, which was equal to the minimum given for second degree murder; and for such other and further reasons as may be advanced at a hearing on the motion."

This motion was denied without a hearing on September 30, 1958, and appellant and his attorney were informed of this disposition by letter dated October 1, 1958. No appeal was taken. Appellant is still in custody. 1/

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1/ The prosecution of appellant's co-defendant took a somewhat different course. After being found competent to stand trial, Foster proceeded to trial. During the trial, the court on October 9, 1958, granted his oral motion for judgment of acquittal by reason of insanity. Foster was committed to St. Elizabeths Hospital. By letters dated May 7, 1959, and July 10, 1959, the Superintendent of St. Elizabeths Hospital informed the court that Foster was without mental disorder and would not in the reasonable future be dangerous to himself or others because of his mental condition. After a hearing on these certifications, the court on July 14, 1959, ordered that Foster be released unconditionally from St. Elizabeths Hospital.

After completing his sentence for housebreaking, appellant moved under 28 U.S.C. 2255 to have his sentence for robbery vacated or corrected. The District Court denied the motion. Irby v. United States, 250 F. Supp. 983 (D.D.C. 1965). In an opinion dated March 15, 1967, a panel of this Court (Circuit Judge McGowan dissenting) held that appellant's sentence for robbery was illegal and remanded the case to the District Court for resentencing on that count. In response to appellee's petition for a rehearing en banc, the judgment and opinion of the panel were vacated by this Court on May 17, 1967, and it was directed that the matter be set for rehearing en banc.

## SUMMARY OF ARGUMENT

I. The facts of appellant's case require reevaluation by this Court of the traditional judicial rules used to assess the legality of consecutive penalties for offenses arising out of a single course of criminal conduct. The two Federal rules -- the same evidence rule and the rule of lenity -- are in sharp discord and have been imperfectly reconciled in recent decisions. The same evidence rule, which permits multiple punishment so

long as the statutory definitions of the crimes differ, would seriously diminish the vigor of the Constitutional protection against double jeopardy if rigidly applied to the facts of this and similar cases. Neither rule offers a very desirable formula for the resolution of the issues raised by appellant.

Experience in jurisdictions such as California and Illinois suggests that another approach would be preferable. In these states consecutive sentences for offenses arising out of a single course of conduct are prohibited if all the offenses are incident to a single objective. Application of this rule has meant that a defendant who committed the offense of housebreaking with the intent of stealing property or robbing the residents cannot be given consecutive sentences for the crimes of housebreaking and larceny, or housebreaking and robbery.

Promulgation of a rule reflecting the experience in these states is a necessary and desirable exercise of this Court's supervisory responsibilities for the administration of criminal justice in the District of Columbia. This Court should prohibit consecutive sentences for offenses arising out of a single course of conduct unless the sentencing judge makes findings to justify the imposition of a sentence exceeding the

maximum available for the most serious offense. Two specific findings should be necessary to justify consecutive sentences in such a context: (1) the court should be required to find that the course of conduct was not motivated by a single intent or objective; and (2) the court should be required to find that a sentence in excess of the maximum available for the most serious offense is desirable to achieve recognized sentencing goals. Adoption of such a rule would meet the objections which can legitimately be raised to an extension of the same evidence or lenity rules to the facts of this case. Moreover, this proposal would assist in reducing excessive sentences and sentence disparities, which are facilitated by the unrestricted discretion to impose consecutive sentences for offenses arising out of a single course of conduct without regard to the offender's culpability.

II. The disposition of the charges against appellant after his plea of guilty to housebreaking and robbery raises serious questions regarding plea bargaining in the District of Columbia. Analysis of these issues is necessary to place the contentions of both parties in proper perspective; it may also serve to highlight the need for new guidelines for the processing of guilty pleas in this jurisdiction. The system of plea bargaining in the

District, in effect, invites charged defendants to enter a plea of guilty in return for the dismissal of pending charges and leniency in sentence, depends administratively on these arrangements to manage existing caseloads, disclaims any official knowledge of or responsibility for the plea negotiations, and refuses to review the sentencing disposition which is the end result.

There is a substantial question whether appellant understood the consequences of his plea of guilty as required by Rule 11 of the Federal Rules of Criminal Procedure. Appellant was not specifically informed by the judge that the maximum sentence for both housebreaking and robbery was 15 years and that, because the sentences could be made consecutive, the maximum possible sentence was 30 years. Even if this Court concludes that this contention is not available to appellant, an explicit requirement to this effect for the benefit of other defendants would give added substance to the requirement of Rule 11 that defendants entering pleas of guilty fully understand the consequences of their act.

Plea negotiations and dispositions in this jurisdiction are largely invisible, informal, and not subject to any systematic control by the courts. Manifest injustice is the result. In appellant's case, the

severe sentence reflects no apparent consideration for appellant's plea of guilty, contrary to appellant's reasonable expectations and the traditional practices and assumptions on which the system is based. There is serious question whether appellant's plea of guilty under such inadequate procedural safeguards can be construed as voluntary within the meaning of Rule 11. In any event, the failure of the courts in this jurisdiction to supervise plea negotiations and to accept responsibility for the accompanying sentencing dispositions results in gross inequities. This Court should prescribe guidelines and procedures which will eliminate abuses such as those reflected in this case.

## ARGUMENT

### I. Consecutive Sentences for Offenses Arising Out of a Single Course of Conduct

The facts of this case must be evaluated in light of the traditional judicial rules applied to multiple offenses arising out of a single course of conduct. Developed against the backdrop of the Fifth Amendment's prohibition of double jeopardy, these rules, including

the recently developed rule of lenity, have prompted considerable debate among courts and commentators attempting to deal fairly with the problem of the offender who violates more than one statutory provision in the course of a criminal venture.[2/] This section of the brief will review the development of the relevant rules, analyze their application to this case, review experience in other jurisdictions, and propose a new rule for the consideration of this Court.

A. The Same Evidence Rule and the Rule of Lenity.

The Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."[3/]

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2/ See, generally, the following discussions of the double jeopardy protection: e.g., Comment, Twice in Jeopardy, 75 Yale L. J. 262 (1965); Comment, The Protection from Multiple Trials, 11 Stan. L. Rev. 735 (1959); Comment, Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee, 65 Yale L. J. 339 (1956); Kirchheimer, The Act, the Offense and Double Jeopardy, 58 Yale L. J. 513 (1949); and ALI, Administration of the Criminal Law: Double Jeopardy (Tent. Draft No. 2, 1932).

3/ The Supreme Court has held that the provision applies to multiple punishment as well as to multiple prosecutions. Ex parte Lange, 85 U.S. (18 Wall.) 163, 173 (1874) ("....the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried....").

As a guide to deciding when the double jeopardy prohibition should be invoked because the "same offense" is involved, the Supreme Court has formulated the same evidence rule. Under the terms of this rule, crimes arising from a single transaction or course of conduct may constitute separate offenses and therefore be subject to separate punishments if each statutory definition requires proof of a fact which the other does not.

Illustrative is the decision of the Supreme Court in Gavieres v. United States, 220 U.S. 338 (1911), holding that a defendant convicted and punished under an ordinance prohibiting drunkenness and rude and boisterous language was not put in second jeopardy by being subsequently tried under another ordinance for insulting a public officer, although the latter charge was based on the same conduct and language as the former. Relying on the leading Massachusetts case of Morey v. Commonwealth, 108 Mass. 433, and Carter v. McClaughry, 183 U.S. 367 (1901), the Supreme Court concluded that the evidence sufficient for conviction under the first charge would not have convicted the defendant under the second indictment.[4/] Thus,

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4/ Two decisions by circuit courts of appeals, one rendered before and one after Gavieres, indicate that earlier Federal law may not have permitted multiple punishment for defendants convicted of burglary and

(cont.)

> "In the second case it was necessary to aver and prove the insult to a public official or agent of the authorities, in his presence or in a writing addressed to him. Without such charge and proof there could have been no conviction in the second case. The requirement of insult to a public official was lacking in the first offense. Upon the charge, under the ordinance, it was necessary to show that the offense was committed in a public place open to public view; the insult to a public official need only be in his presence or addressed to him in writing. Each offense required proof of a fact, which the other did not. Consequently a conviction of one would not bar a prosecution for the other." 220 U.S. at 343-44.

The subsequent decisions of the Supreme Court applying the same evidence rule reflect considerable deference to the legislature's decision to define as crimes separate acts committed by a defendant in the course of a single

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4/ (cont.)

larceny. In Halligan v. Wayne, 179 Fed. 112 (9th Cir. 1910), the court held that one accused of burglary and larceny may be punished for either offense but not for both. This court makes no mention of the earlier Carter v. McClaughry decision of the Supreme Court in which the same evidence rule was first set forth as the appropriate test when multiple punishment followed a single criminal act. Even more surprising, however, is the decision in Munson v. McClaughry, 198 Fed. 72 (8th Cir. 1912). Here the court again held that consecutive sentences for a defendant convicted of burglary and larceny stemming from the same transaction were illegal. Not only is Carter not mentioned in this opinion, but the more recent Gavieres case is not cited. On the contrary, Sanborn, C.J., in his majority opinion refers to the Halligan decision and follows that line of cases. These two cases indicate that a substantial line of Federal and state precedents existed which are contrary to the same evidence test of the Carter, Gavieres, and Morey cases.

venture. In Ebeling v. Morgan, 237 U.S. 625 (1915), the Court sustained the contention that the successive cuttings of different mail bags constituted separate offenses, even though the separate cuttings occurred at the same time and place. Construing the same evidence rule strictly, the Court concluded that

> "proof of cutting and opening one sack completed the offense, and although defendant continued the operation by cutting into other sacks, proof of cutting one sack would not have supported the counts of the indictment as to cutting the others; nor was there that continuity of offense which made the several acts charged against the defendant only one crime." Id. at 631.

In a companion case, Morgan v. Devine, 237 U.S. 632 (1915), the Court followed the same rationale in concluding that the breaking into a post office and the stealing of post office property could be separately charged and punished. The Court rejected the contention that a single criminal intent motivated the entire transaction, so that separate punishment for the two offenses would violate the double jeopardy prohibition. The Court concluded that "it is manifest that Congress in the enactment of these sections intended to describe separate and distinct offenses" and emphasized that the two crimes had different ingredients. Id. at 638. According to the Court,

> "the test is not whether the criminal intent is one and the same and inspiring the whole transaction, but whether separate acts have been committed with the requisite criminal intent and are such as are made punishable by the act of Congress." Id. at 640.

In short,

> "this court has settled that the test of identity of offenses is whether the same evidence is required to sustain them; if not, then the fact that both charges relate to and grow out of one transaction does not make a single offense where two are defined by the statutes." Id. at 641.

In Blockburger v. United States, 284 U.S. 299 (1932), relying on its Gavieres and Ebeling decisions, the Court held that two sales of morphine not from the original stamped package constituted separate offenses under § 1 of the Narcotics Act, although buyer and seller were the same in both cases and very little time passed between the end of one transaction and the beginning of the other. The Court reaffirmed the same evidence rule saying:

> "Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Id. at 304.

The same evidence rule established by the Supreme Court has been followed in this jurisdiction. In District of Columbia v. Buckley, 75 U.S.App.D.C. 301, 128 F. 2d 17

(1942), this Court permitted a second prosecution for the offense of driving while intoxicated although the defendant had previously entered a plea of guilty to the offense of driving on the wrong side of the street. It was contended that both offenses were the outgrowth of one identical act and that the second prosecution therefore violated the guarantees of the Fifth Amendment. In reliance on the Supreme Court decisions, this Court concluded that the same evidence would not sustain the two charges in question and that therefore the second prosecution was permissible. Id. at 303, 128 F. 2d at 19-20.[5/] In response to the lower court's conclusion that such a rule permitted oppressive prosecutive action, this Court concluded that

> "the definition of offenses is for the legislative authority, and the determination of whether and when to prosecute for more than one growing out of the same transaction is a matter of policy for the prosecuting officer and not for the determination of the courts. Moreover, while under some circumstances it might be unfair to prosecute for more than one offense, under others the danger to the public from the conduct of an offender might be such as well to warrant

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5/ See also, Sims v. Rives, 66 U.S.App.D.C. 24, 84 F. 2d 871 (1936), cert. den. 278 U.S. 682 (1936), where the Court relied upon the Supreme Court's decisions in Gavieres and Morgan v. Devine to permit a second conviction for illegal transportation of liquor on the grounds that different evidence was required to support a conviction under each of the two regulatory statutes.

his prosecution for all offenses committed. There is an insufficient disclosure of the circumstances of the instant case to warrant any conclusion, even if we had authority to reach one, as to whether the action of the Corporation Counsel's office in the instant case was fair or not fair." Id. at 304-05, 128 F. 2d at 20-21.

The Development of the Rule of Lenity

In recent years, the Supreme Court has announced a rule of lenity which operates to mitigate the rigidity of the same evidence rule. The rule was first framed in Bell v. United States, 349 U.S. 81 (1955), in which the defendant had pleaded guilty to two counts of violating the Mann Act. The defendant had transported two women on the same trip and in the same vehicle; each count charged a violation with reference to one woman. The Court concluded that Congress had not expressly provided that the simultaneous transportation of more than one woman in violation of the Mann Act would subject the defendant to cumulative punishment for each woman so transported. Because of this failure to make clear the appropriate unit of prosecution under the statute, the Court stated:

> "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of

> a penal code against the imposition of a harsher punishment. This in no wise implies that language used in criminal statutes should not be read with the saving grace of common sense with which other enactments, not cast in technical language, are to be read. Nor does it assume that offenders against the law carefully read the penal code before they embark on crime. It merely means that if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses, when we have no more to go on than the present case furnishes." Id. at 83-84.

The rule of lenity was also applied to a significantly different crime in Prince v. United States, 352 U.S. 322 (1957). Here the defendant was convicted under the Federal Bank Robbery Act on a two count indictment charging robbery of a Federally insured bank and entering the bank with intent to commit a felony. The Court held that a consecutive sentence for these two statutory offenses was improper. Although the Court cautioned that its decision should be "narrow" because it was dealing with a "unique statute of limited purpose" (Id. at 325), the Court stated:

> "It is a fair inference from the wording in the Act, uncontradicted by anything in the meager legislative history, that the unlawful entry provision was inserted to cover the situation where a person enters a bank for the purpose of committing a crime, but is frustrated for some reason before completing the crime. The gravamen of the offense is not in the act of entering, which satisfies the terms of the statute even if it is simply walking through an open, public door during normal business hours. Rather the heart of the crime is the intent to steal. This mental element merges into the

> completed crime if the robbery is consummated. To go beyond this reasoning would compel us to find that Congress intended, by the 1937 amendment, to make drastic changes in authorized punishments. This we cannot do. If Congress had so intended, the result could have been accomplished easily with certainty rather than by indirection." Id. at 328.

While recognizing that "reasonable minds might differ on this conclusion," the Court contended that such a result "is consistent with our policy of not attributing to Congress, in the enactment of criminal statutes, an intention to punish more severely than the language of its laws clearly imports in the light of pertinent legislative history." Id. at 329.

In Gore v. United States, 357 U.S. 386 (1958), the Court made its first attempt to resolve the conflict between the different rules. In reaffirming its earlier decision in Blockburger, a closely divided court held that consecutive sentences were permissible under three Federal statutes applied to a single illegal sale of narcotics, stating:

> "The fact that an offender violates by a single transaction several regulatory controls devised by Congress as means for dealing with a social evil as deleterious as it is difficult to combat does not make the several different regulatory controls single and identic." Id. at 389.

The Court distinguished the Bell case, asserting:

> "It is one thing for a single transaction to include several units relating to proscribed conduct under a single provision of a statute. It is a wholly different thing to evolve a rule of lenity for three violations of three separate offenses created by Congress at three different times, all to the end of dealing more and more strictly with...the traffic in narcotics. Both in the unfolding of the substantive provisions of law and in the scale of punishments, Congress has manifested an attitude not of lenity but of severity toward violation of the narcotics laws." Id. at 391.

The Prince case was distinguished by reference to the Court's statement in the Prince opinion that it was concerned with "a unique statute of limited purpose." Id. at 392. In this way, Gore represents the culmination of the line of same evidence cases. 6/

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6/ Four Justices dissented from the Gore opinion. Three of the four relied heavily on the rule of lenity decisions for their objections. The Chief Justice dissented on the grounds that in each instance the problem in multiple punishment cases is "to ascertain what the legislature intended." Warning against "easy application of stereotyped formulae," he concludes that in this case the purpose of Congress in the passage of these statutes was to allow multiple routes to prosecution, not multiple penalties. Id. at 394. Mr. Justice Douglas, whom Mr. Justice Black joined in dissenting, would overrule Blockburger, arguing:

> "Here the same sale is made to do service for three prosecutions. The different evidence test, which was adopted without much analysis by the Court in Carter v. McClaughry [citation

(cont.)

Two other decisions of the Supreme Court have applied the rule of lenity to preclude consecutive sentences for offenses arising out of a single course of conduct. In Ladner v. United States, 358 U.S. 169 (1958), the Court held that a single discharge of a shotgun would constitute only a single violation of the Federal statute penalizing an assault on a Federal officer even though more than one officer was injured by the shotgun discharge. According to the Court, the "policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on

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6/ (cont.)

> omitted] would permit the practice. Yet I agree with Bishop:'...in principle, and by better judicial view, while the legislature may pronounce as many combinations of things as it pleases criminal...it is in the language of Cockburn, J., 'a fundamental rule of law that out of the same facts a series of charges shall not be preferred.'' [citation omitted] I think it is time that the Double Jeopardy Clause was liberally construed in light of its great historic purpose to protect the citizen from more than one trial for the same act." Id. at 396.

Mr. Justice Brennan dissented from the Gore opinion on the grounds that even if the Blockburger test were applied, this case should be reversed for not meeting the requisites of that test. Id. at 397-98.

no more than a guess as to what Congress intended." Id. at 178. In Heflin v. United States, 358 U.S. 415 (1959), the Court held that a defendant could not be lawfully convicted under the Federal Bank Robbery Act of feloniously receiving and of feloniously taking the same property. Relying on its construction of the Bank Robbery Act in the Prince case, the Court held that the subsection of the statute referring to the receipt of stolen property "was not designed to increase the punishment for him who robs a bank but only to provide punishment for those who receive the loot from the robber." Id. at 419. The Court concluded that Congress, by designing the offense of receiving stolen property, "was trying to reach a new group of wrongdoers, not to multiply the offense of the bank robbers themselves." Id. at 420.

In Callanan v. United States, 364 U.S. 587 (1961), the Court held that consecutive sentences could be imposed under the Hobbs Anti-Racketeering Act for the separate offenses of obstructing interstate commerce by extortion and for conspiring to do so. The Court emphasized the distinctness of the substantive offense and a conspiracy, reasoning that "the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise." Id. at 594. Mr. Justice

Frankfurter, refuting petitioner's argument that the rule of lenity should apply, stated:

> "[In Bell and Ladner] the applicable statutory provisions were found to be unclear as to the appropriate unit of prosecution; accordingly, the rule of lenity was utilized in favorem libertatis, to resolve the ambiguity. [In Prince and Heflin] the Court had to meet the problem whether various subsidiary provisions of the Federal Bank Robbery Act [citation omitted], which punished entering with intent to commit robbery and possessing stolen property, merged when applied to a defendant who was also being prosecuted for the robbery itself. Again the rule of lenity served to resolve the doubt with which Congress faced the Court.
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> "Here we have no such dubieties within the statute itself. Unlike all of these cases, the problem before us does not involve the appropriate unit of prosecution -- whether conduct constitutes one or several violations of a single statutory provision -- nor is it an open question whether conspiracy and its substantive aim merge into a single offense. This is an ordinary case of a defendant convicted of violating two separate provisions of a statute, whereby Congress defined two historically distinctive crimes composed of differing components." Id. at 596-97.

As in Gore, there were four dissenters to the Callanan decision. Mr. Justice Stewart, writing for himself, the Chief Justice, Mr. Justice Black, and Mr. Justice Douglas, restated the principle of the Bell, Ladner, and Prince cases and concluded: "These recent expressions are but restatements in a specific context of the ancient rule that a criminal statute is to be strictly construed. I would not depart from that rule in the present case." Id. at 602.

Recent District of Columbia Cases

In 1956, between the Bell and Prince decisions, this Court sustained consecutive sentences for crimes committed in a single course of conduct in Kendrick v. United States, 99 U.S.App.D.C. 173, 238 F. 2d 34 (1956). Consecutive sentences were upheld for defendant's conviction under a two count indictment charging an assault with a deadly weapon and concealing an unlicensed pistol on his person. Without reference to the 1955 Bell decision, this Court said: "A single act which violates two statutes is punishable under both, unless the offenses defined therein are identical. The test of identity is whether the same evidence will sustain both charges." Id. at 175, 238 F. 2d at 36. (Emphasis added.)

A similar result was reached in United States v. Bauer, 198 F. Supp. 753 (D.D.C. 1961), in which the District Court held that assault with a dangerous weapon involved an element not essential in the crime of robbery and, therefore, consecutive sentences were properly imposed. The court regarded as "well settled" the propriety of imposition of consecutive sentences for separate offenses arising out of the same transaction or the same chain of events if "the offense charged in one count involves any

different elements than an offense charged in another count." Id. at 753-54.7/

Two recent decisions of this Court have expanded the rule of lenity in the District of Columbia. In Ingram v. United States, 122 U.S.App.D.C. 334, 353 F. 2d 872 (1965), the defendant was convicted of assault with intent to kill and assault with a dangerous weapon. Consecutive sentences were imposed, resulting in a maximum

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7/ Without discussing the issue, this Court observed in Cross v. United States, 122 U.S.App.D.C. 380, 354 F. 2d 512 (1965), that the determination as to whether sentences should be served consecutively or concurrently is a matter for the trial judge's discretion, in a case where consecutive sentences had been imposed for the offenses of housebreaking and assault with a dangerous weapon. The assault in the Cross case consisted of forcing a young woman at pistol point to serve as a cover for the escape of those participating in a housebreaking. Id. at 382, 354 F. 2d at 514, n. 3. This Court has also followed the Supreme Court's decision in Gore to permit the imposition of consecutive sentences under different statutes for a single illegal narcotics transaction. See, e.g., Williams v. United States, 118 U.S.App.D.C. 108, 332 F. 2d 308 (1964). Compare Evans v. United States, 98 U.S.App.D.C. 122, 232 F. 2d 379 (1956), where concurrent sentences had been imposed after conviction for grand larceny and unauthorized use of a vehicle. This Court recognized that the same act may at times constitute two offenses and justify separate sentences, "providing they run concurrently." Id. at 123, 232 F. 2d at 380. The opinion suggested that "a different result would probably be necessary if the sentences had been imposed to run consecutively." Ibid.

sentence exceeding by six years the statutory maximum of 15 years for assault with intent to kill, the more serious of the two offenses. Id. at 335, 353 F. 2d at 872-73. Since the two offenses had not been "considered by Congress as parts of a single problem," this Court recognized that the legislative intent relied upon by the Supreme Court in Prince and related cases was "not so obvious." Id. at 336, 353 F. 2d at 874. According to this Court's opinion,

> "The stereotyped formula is that since there are two offenses, one requiring proof of a factor the other does not, two punishments are permissible. Looking beyond the stereotyped formula, however, we cannot say with any certainty that Congress intended that one assault with a knife in an attempt to kill would be twice punished because it was an assault with a knife. To say such an act constitutes both an assault with a deadly weapon and an assault with intent to kill does not say that the punishment may be twofold where the offenses are commingled in one assault, unless it can be said also that two punishments were intended by Congress. We think this cannot be said. This is the substance of the holding in Prince, although expressed there in terms of only one crime being intended rather than only one punishment." Id. at 336-37, 353 F. 2d at 874-75.

Reasoning that the District of Columbia Code defines four different kinds of assaults with descending degrees of severity, therefore suggesting grading of aggravated assaults, this Court concluded that "it is unlikely that Congress intended a single act to be punished cumulatively

as both a more and a less serious form of aggravated assault." Id. at 337, 353 F. 2d at 875. In short,

> "Congress created no crime of assault with a deadly weapon with intent to kill. It would be pure speculation to conclude that Congress intended the punishment for such a single assault to permit the consecutive sentences imposed in this case. Doubts in this area of the law are resolved not only in favor of lenity, but in favor of rational and reasonable probabilities of legislative intent where such intent is left unclear. In Gore, on the other hand, the Court was clearly of the view that Congress affirmatively intended each of the separate offenses to bear its own penalty, in aid of the determination of Congress to use severe methods to stamp out the traffic in narcotics." Ibid.8/

A similar result was reached in Davenport v. United States, 122 U.S.App.D.C. 344, 353 F. 2d 882 (1965), on defendant's motions for correction of an illegal sentence

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8/ In his dissenting opinion, Judge Burger concluded that the relevant statutes created separate offenses and that, therefore, under the Gore-Blockburger rationale, consecutive sentences were appropriate because different facts had to be proved to make out a violation of the two statutes. Judge Burger distinguished the Supreme Court cases relied upon by the majority and emphasized that the crime of assault with intent to kill and assault with a dangerous weapon "involve different behavior and the fact that both may be present at the same time does not modify the congressional intent that they be treated separately." Id. at 339, 353 F. 2d at 877.

and to withdraw his plea of guilty to the charge of assault with a dangerous weapon. The defendant in Davenport pleaded guilty to a charge of assault with intent to kill. After the victim of his assault died, he was indicted for murder in the first degree. Defendant pleaded guilty to the lesser offense of manslaughter and was later sentenced to a prison term which was made consecutive to the sentence on his assault conviction. This Court found that the language and history of the two statutes involved were inconclusive and concluded, for the reasons stated in the Ingram case, that Congress did not intend to authorize consecutive punishments for aggravated assault and manslaughter in these circumstances.

B. Evaluation of Supreme Court Rules.

Recent Supreme Court cases have not clarified the present status of the two competing rules -- lenity and same evidence. As applied to the facts in appellant's case, both rules have serious shortcomings.

(1) In their present stage of development, the two rules are conflicting in their underlying purposes and potential applications. As one commentator has pointed out: "The rule of lenity is in complete discord with the counterpoint theme of substantive double jeopardy law --

the Gore rule."[9/] Sharply divided courts have continually disagreed on the scope of the rule of lenity and the desirability of the same evidence rule. Neither rule presently offers very reliable guidelines in deciding the legality of consecutive sentences imposed for offenses arising out of a single course of conduct.

(2) The application of the same evidence rule in the Federal system has prompted considerable criticism. It is asserted generally that the same evidence rule in multiple punishment cases is historically outmoded and, if strictly applied, would void the Constitutional prohibition against double jeopardy.

As originally advanced in Morey v. Commonwealth, 108 Mass. (12 Browne) 433 (1871), the rule was designed to protect the state against technical rules of pleading and proof. Since any variance between the facts pleaded and the facts shown at trial could lead to acquittal, the same evidence rule allowed multiple count indictments to protect the state's case from fatal variances. Based on this historical genesis, critics of the same evidence rule draw two conclusions as to its applicability in multiple

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9/ Comment, Twice in Jeopardy, 75 Yale L. J. 262, 314 (1965). See also Hoffman, What Next in Federal Criminal Rules, 21 Wash. & Lee L. Rev. 1, 7 (1964) (describing the situation as in a "state of confusion").

punishment situations. First, since procedure has been modernized, the original reasons for the rule no longer exist.[10] Second, it is urged that the same evidence rule was never intended to reach the question of the double jeopardy consequences of multiple punishment for actions arising out of a single course of conduct. The historical thrust of the rule was to allow multiple count indictments and multiple prosecutions. The application of the rule to multiple punishment by the Supreme Court in Carter v. McClaughry reflects a misconception of its prior use in the United States and England. The King v. Vandercomb & Abbott, 2 Leach 707, 720 Eng. Rep. 455 (1796).

Beyond the historical argument it is clear that, if the rule is applied without limitation, there is a substantial risk that the prohibitions of the double jeopardy provision of the Fifth Amendment will be rendered meaningless. In his concurring opinion in District of Columbia v. Buckley, 75 U.S.App.D.C. 301, 128 F. 2d 17 (1942), Associate Justice Rutledge concedes that the same evidence test may be useful to disclose whether any difference

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10/ See Kirchheimer, The Act, the Offense and Double Jeopardy, 58 Yale L. J. 513, 525-29 (1949).

exists between the elements of the crimes charged, but states that a court "must evaluate as well as spell out the difference, and determine whether the element it affects is sufficiently important in relation to other elements involved in both crimes to justify refusal to apply the constitutional protection." Id. at 305, 128 F. 2d at 21. Justice Rutledge goes on to observe that although the legislature should have wide leeway to define crimes, there must be some limitation on legislative refinement of crimes if the citizen's Fifth Amendment rights are to be protected. He reasons that the same evidence rule cannot be effectively used to protect those rights, for:

> "The 'same or different evidence' rule only points out the difference. It puts no limit to how narrow the legislature can make it. I think courts have a duty to do that, as well as one to find out whether the legislature has made a difference. In other words, it is for them finally to say whether a distinction prescribed by the legislature is strong enough to overcome the constitutional guaranty. Under the 'same or different evidence' test alone, they well nigh abandon that function in some cases where difference is very slight." Id. at 306, 128 F. 2d at 22.

More recently, it has been contended that the same evidence test has produced a "fragmentation of crimes into multiple

separately punishable components."[11] It is apparent that the rule entails the risk that the multiplication of criminal offenses arising out of a single course of conduct is limited only by the ingenuity and imagination of Congress.

(3) Application of the rule of lenity to the facts of this or similar cases in the District of Columbia also raises serious difficulties. The rule is totally dependent upon legislative intent. Those decisions seeking to extend the rule reason that an absence of intent specifically on point requires that the rule be applied so as to prohibit the cumulation of sentences; those who contend that the rule should be limited would require that it be applied only when there is a clear legislative intent that the offenses arising out of a single course of conduct should not be subject to cumulative sentences.

As the Chief Justice observed in his dissent in Gore, however, "these are not problems that receive explicit legislative consideration." 357 U.S. 386, 394 (1958).

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11/ Gore v. United States, 100 U.S.App.D.C. 315, 319, 244 F. 2d 763, 767 (1957) (concurring opinion of Bazelon, J.). See also Note, Statutory Multiple Punishment and Multiple Prosecution Protection: An Analysis of Minnesota Statute Section 609.035, 50 Minn. L. Rev. 1102, 1103 (1966) (suggesting that prohibition of double jeopardy is "illusory" in part because of reliance on statutory provisions to define "same offense").

Nevertheless, a search for meaningful legislative intent is understandable when the crimes at issue are Federal crimes enacted by Congress to support a Federal regulatory program or to meet a specific problem within the reach of the Federal criminal jurisdiction. The statutes under review in such cases as Bell, Prince, Callanan, and Gore are illustrative. But the situation is necessarily much different with regard to those criminal offenses defined in the District of Columbia Code, such as housebreaking and robbery, with their distant common law precedents and extended statutory existence.[12/] Where these local crimes are concerned, the effort to find any relevant legislative intent as to the interrelationship between the crimes is destined to be largely unproductive. Any rule for dealing with this problem in this jurisdiction, therefore, which relies exclusively on legislative intent, is bound to be both imperfect and inconsistent in its application to those combinations of crimes which are likely to occur in the course of a single criminal venture.

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12/ Congress last considered the District's criminal code in its entirety in 1901. As the opinion below points out, there was no evidence of a Congressional intent that the criminal penalties prescribed be restricted to alternative use. 250 F. Supp. 983, 988 (D.D.C. 1965). Conversely, there is no evidence of a Congressional intent to deal expressly with the problem before this Court.

Moreover, the rule of lenity has many of the deficiencies of a black letter rule of law. If this rule is applied, consecutive sentences are prohibited, regardless of the specific facts underlying the criminal charges or any justification for departing from the rule in a particular case. To this degree, therefore, the rule does not provide any opportunity for the sentencing judge to impose consecutive sentences in those cases where it may be demonstrably necessary or desirable.

C. Experience in Other Jurisdictions.

The rules developed in the Federal cases are not the only available guides for the formulation of a coherent policy relating to multiple punishment for offenses arising from a single course of conduct. In view of the limitations of the Federal rules, it is particularly desirable to consider the practices developed in other jurisdictions for dealing with this problem.

California

Since 1872 California has provided by statute that "an act or omission which is made punishable in different ways by different provisions of this Code may be punished under either of such provisions, but in no case can it be

punished under more than one...." Calif. Penal Code § 654.[13/] Until recently the California courts placed a severely restricted interpretation on Section 654, holding that it was inapplicable whenever a single act gave rise to more than one offense; the test applied to determine the number of offenses was normally the Blockburger same evidence test. See Note, The Protection from Multiple Trials, 11 Stan. L. Rev. 735 (1959). Thus, for example, in People v. Coltrin, 5 Cal. 2d 649, 55 P. 2d 1161 (1936), the Court held that a defendant convicted of performing an illegal abortion resulting in the death of the victim could be sentenced for both abortion and murder.

During the next two decades, however, the California Supreme Court abandoned the legalistic equation of "act" and "offense" and sought to formulate a rule which would avoid artificial distinctions in determining whether the case involved a single act or several acts. By 1958 the definition of "act" had been substantially broadened by the California Court, but one commentator reviewing the cases was forced to conclude that "as a matter of practi-

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13/ Several states have similar statutes. See Ala. Code Tit. 15, § 287 (1958); Ariz. Rev. Stat. Ann. § 13-1641 (1956); N. Y. Pen. Law § 1938 (1909); Utah Code Ann. § 76-1-23 (1935). See also Model Penal Code § 221.1(3) (Tent. Draft No. 11, 1960).

cality, there really does not seem to be any one test which will yield a consistent result in all cases." Comment, 32 So. Calif. L. Rev. 50, 64 (1958). The California Court admitted as much itself in the same year when, in overruling the Coltrin decision, it stated that a "course of conduct" violating more than one statute cannot support multiple punishments unless it is a "divisible transaction," but that "where the question is whether a transaction is divisible or indivisible, each case must be resolved on its facts." People v. Brown, 49 Cal. 2d 577, 591, 320 P. 2d 5, 14 (1958).

But in Neal v. State, 55 Cal. 2d 11, 357 P. 2d 839, 9 Cal. Rptr. 607 (1960), the California Supreme Court, speaking through Justice Traynor, announced a simple, workable rule for deciding multiple punishment cases which has since been consistently applied by the California courts:

> "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." Id. at 19, 357 P. 2d at 843-44, 9 Cal. Rptr. at 611-12.

In Neal the defendant had been convicted on two counts of attempted murder and one count of arson, arising out of his throwing gasoline into a bedroom occupied by a sleeping couple and igniting the gasoline. Since the arson was "the means of perpetrating the crime of attempted murder" and thus was "merely incidental to the primary objective of killing" the couple, the defendant could only be punished for the more serious offense of attempted murder. Id. at 19, 357 P. 2d at 844, 9 Cal. Rptr. at 612.[14/] But separate sentences on the two counts of

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14/ Despite the efforts of Judge Sobel to develop a rule similar to California's, the development of New York's statute (§ 1938) has been different from the California experience. In People v. Savarese, 1 Misc. 2d 305, 114 N.Y.S. 2d 816, 835 (Kings County Ct. 1952), Judge Sobel stated: "The true factual test is 'Were all of the acts performed necessary to or incidental to the commission of a single crime and motivated by an intent to commit that crime'?" (Emphasis in original.) When higher New York courts did not follow his suggestion for a Neal-type rule, Judge Sobel tried again in People v. De Sisto, 27 Misc. 2d 217, 214 N.Y.S. 2d 858, 874-76, 902-04 (Kings County Ct. 1961); rev'd sub nom. People v. LoCicero, 17 App. Div. 2d 31, 230 N.Y.S. 2d 384 (1962); rev'd in part 14 N.Y. 2d 374, 251 N.Y.S. 2d 953 (1964), wherein he relied on the test he set forth in Savarese to find double punishment impermissible. New York courts have rejected this approach in favor of a modified same evidence rule. In People v. Di Lapo, 14 N.Y. 2d 170 (1964), for example, the court held double punishment proper for a defendant convicted of both attempted robbery and assault with intent to kill where both crimes were committed in the same transaction.

attempted murder were upheld: the purpose of the protection against multiple punishment is to insure that the defendant's punishment will be "commensurate with his criminal liability," and one who commits an act of violence against two persons is "more culpable than a defendant who harms only one person." Ibid.

The Neal test has been applied by the California courts in a number of situations involving burglary and theft, robbery or other offenses committed within the dwelling. In People v. McFarland, 58 Cal. 2d 748, 376 P. 2d 449, 26 Cal. Rptr. 473 (1962), it was held that the defendant could not be sentenced for both burglary and grand theft arising out of his entry into a hospital under construction and stealing an air compressor:

> "The record contains nothing indicating that he entered the hospital with intent to commit some crime other than theft. In these circumstances the only reasonable conclusion is that the entry of the hospital and the taking of the air compressor were parts of a continuous course of conduct and were motivated by one objective, theft; the burglary, although complete before the theft was committed, was incidental to and a means of perpetrating the theft.

"Thus defendant can be punished for either offense but not for both...." Id. at 762, 376 P. 2d at 457, 26 Cal Rptr. at 481.15/

The leading California case on sentencing for burglary and robbery is In re Dowding, 188 Cal. App. 2d 418, 10 Cal. Rptr. 392 (1961) (hearing by California Supreme Court denied), approved in People v. McFarland, supra at 762, 376 P. 2d at 457, 26 Cal. Rptr. at 481. Applying the Neal rule, the District Court of Appeals held that the defendant could not be sentenced for both burglary and robbery committed in a single course of conduct involving the entry of a drugstore with intent to rob the druggist.

Neal and Dowding were held to be controlling in Downs v. State, 202 Cal. App. 2d 609, 20 Cal. Rptr. 922 (1962).

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15/ See also, e.g., In re Romano, 64 Cal. 2d 826, 415 P. 2d 798, 51 Cal. Rptr. 910 (1966) (burglary and grand theft; sentence permitted for burglary only); People v. Collins, 220 Cal. App. 2d 563, 33 Cal. Rptr. 638 (1963) (burglary, assault, and theft; sentence permitted for burglary only). The Alabama statute prohibiting multiple punishment has recently been applied in two cases concerning burglary and larceny. In the leading case, Wildman v. State, 42 Ala. 357, 165 So. 2d 396 (1963), cert. den., 165 So. 2d 403 (1964), the Court of Appeals of Alabama held that a defendant convicted of both grand larceny and second degree burglary of the same hardware company on the same occasion could be sentenced under one or the other of the judgments of conviction, but not under both. This principle was followed in another Alabama burglary-larceny case. Wade v. State, 42 Ala. 400, 166 So.2d 739 (1964).

There the petitioner and a cohort broke into an office building and were engaged in looting the safe when two janitors entered the room. Petitioner and his partner compelled the janitors at gunpoint to lie down and tied them. The looting of the safe was then completed. The State argued that consecutive sentences for burglary and robbery should be upheld by the District Court of Appeals since the burglary count charged entry of the building with intent to commit theft and the trier of fact could have found that the intent to commit robbery originated in the petitioner's mind only after the janitors arrived on the scene. The Court agreed that the State's argument was theoretically sound, but held that the record would not support it and that only the robbery sentence could stand:

> "Regardless of the wording of the information, petitioner entered the telephone company building with the single purpose to rifle its safe, hoping, no doubt, that this could be accomplished without interference, but prepared for that event by carrying a gun which he intended to and did threateningly use to consummate the crime. To urge that these gun-toting miscreants had limited their original object to safe-cracking only, upon the unlikely assumption that nightly janitorial service was not performed in the telephone company building is unrealistic and unsupported by the record. The information, had it been worded with strict accuracy, would have accused petitioner of entering to commit either theft or robbery as might become necessary."

Id. at 614, 20 Cal. Rptr. at 925. (Emphasis in original.)16/

In California, the Neal rule against multiple punishment is applied to eliminate concurrent, as well as consecutive, sentences. In re Wright, 65 Cal. 2d 698, 422 P. 2d 998, 56 Cal. Rptr. 110 (1967). Moreover, it applies only to multiple sentencing; it does not forbid multiple convictions. Ibid; People v. McFarland, 58 Cal. 2d 748, 762, 376 P. 2d 449, 457, 26 Cal. Rptr. 473, 481 (1962). Nor has it any application to double jeopardy issues raised by multiple prosecutions. People v. Tideman, 57 Cal. 2d 574, 585-87, 370 P. 2d 1007, 1015, 21 Cal. Rptr. 207, 215 (1962).

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16/ Compare In re Ward, 64 Cal. 2d 875, 414 P. 2d 400, 51 Cal. Rptr. 272 (1966) (where purpose of kidnapping was robbery only, rape of victim may be separately punished, in addition to punishment for kidnapping; sentence for robbery, however, must be set aside). See also, e.g., People v. Jones, 211 Cal. App. 2d 63, 27 Cal. Rptr. 429 (1962), hearing denied by California Supreme Court (1963) (burglary and robbery; sentence permitted for burglary only); People v. Helms, 242 Cal. App. 2d 476, 51 Cal. Rptr. 484 (1966) (multiple sentences for burglary, robbery, and assault, all incidental to single objective of obtaining victim's possessions, cannot stand); compare In re McGrew, 427 P. 2d 161, 58 Cal. Rptr. 561 (1967) (burglary and sex offenses; sentence permitted for burglary only).

Illinois

Recent decisions in Illinois have established the principle that there should be no cumulative punishment for offenses arising out of a single course of conduct. After eight years of judicial development, the state legislature codified this established principle. Nevertheless, the experience of the Illinois courts provides an example for jurisdictions such as the District of Columbia which have no statute to guide their decisions in multiple punishment cases.[17/]

The leading Illinois case is People v. Stingley, 414 Ill. 398, 111 N.E. 2d 548, cert. den. 345 U.S. 959 (1953), in which the Illinois Supreme Court held that imposition of consecutive sentences for assault with intent to rape and assault with intent to murder "would prejudice the defendant and would violate his constitutional rights" where the two offenses arose out of a single series of acts committed against the same victim at the same time and place. In reaching this result, the Court said in part:

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17/ Illinois is not alone in acting judicially to prohibit multiple punishment when offenses arise from a single transaction. Michigan courts have held that they can never cumulate sentences in absence of specific legislative authorization. See Ex parte Allison, 322 Mich. 491, 33 N.W. 2d 917 (1948).

> "The State has cited no cases within this jurisdiction to support its position that the two consecutive sentences are valid and we are unable to find any authority in this State for the proposition that consecutive sentences may be imposed under the facts and circumstances shown here. There is a wealth of authority intimating such an imposition would prejudice the defendant and would violate his constitutional rights. We agree it would have this effect." Id. at 404, 111 N.E. 2d at 551.

The Stingley rule was extended in People v. Schlenger, 13 Ill. 2d 63, 147 N.E. 2d 316 (1958), to prevent imposition of concurrent sentences arising out of a single transaction, on the ground that the defendant's application for parole might be adversely affected by the second sentence.

These judicially created rules were codified in § 1-7(m) of the Illinois Criminal Code of 1961 which reads:

> "§ 1-7(m) Consecutive and Concurrent Sentences
>
> "When a person shall have been convicted of 2 or more offenses which did not result from the same conduct, either before or after sentence has been pronounced upon him for either, the court in its discretion may order that the term of imprisonment upon any one of the convictions may commence at the expiration of the term of imprisonment upon any other of the offenses."

The comments to the 1961 Code make clear that the purpose of this section was to enact the previous judicial opinions:

> "Subsection (m) is intended to codify the holding in People v. Schlenger, 13 Ill. 2d 63, 147 N.E. 2d 316 (1958), by the implicit converse of the provision stated, i.e., if

> the offenses resulted from the same conduct, the defendant may not be sentenced on both, either concurrently or consecutively." 38 Smith-Hurd Ill. Am. Stat. § 1-7(m) and Committee Comments, 2-4 (1964).

Even after enactment of the statute, Illinois courts relied on the Stingley and Schlenger decisions as the source of the rule. For example, in People v. Duszkewycz, 27 Ill. 2d 257, 189 N.E. 2d 299 (1963), the court, in striking down concurrent sentences for rape and incest based on a single act, reasoned:

> "While neither the Stingley case nor the Schlenger case is precisely in point, the views there expressed indicate the basis of decision in the present case. The Stingley case makes it clear that two punishments cannot be imposed for a single act, even though different ingredients are involved in the two crimes." Id. at 261, 189 N.E. 2d at 301.

Relying on the new statutory provision and judicial precedents, an Illinois Appellate Court has recently held that a defendant convicted of rape and burglary with intent to commit rape can be sentenced only for rape.[18/]

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18/ People v. Ritchie, 66 Ill. App. 2d 302, 213 N.E. 2d 651 (1966). See also People v. Edwards, 74 Ill. App. 2d 225, 219 N.E. 2d 382 (1966) (conspiracy to escape and aiding escape); People v. Miller, 74 Ill. App. 2d 356, 220 N.E. 2d 1 (1966) (rape and contributing to the delinquency of a minor). But see, People v. Hartnett, 49 Ill. App. 2d 357, 199 N.E. 2d 671 (1964), in which the Appellate Court held that separate sentences were proper where the defendant was convicted of burglary and assault.

D. A Proposed Rule for the District of Columbia.

Neither the same evidence rule nor the rule of lenity should be determinative in resolving the issues raised by appellant's case. Promulgation of a new rule by this Court to deal with the cumulation of sentences in this context is entirely appropriate. There is no legislation expressly on point; the same evidence and lenity rules have been elaborated by the courts and are subject to reevaluation in light of the policies at stake and the alternatives available. This Court has special supervisory powers over the administration of criminal justice in the District of Columbia which permit this Court to formulate a rule for the District which differs from that followed in other Federal jurisdictions. 19/ This Court has recently prescribed standards pertaining to the sentencing of offenders, where the lower courts

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19/ In a case involving the admissibility of evidence, the Supreme Court in Griffin v. United States, 336 U.S. 704, 714 (1949), stated that "the Court of Appeals for the District of Columbia ought not to be denied opportunity to formulate rules of evidence appropriate for the District, so long as the rules chosen do not offend statutory or constitutional limitations." In one landmark case, moreover, this Court invoked its inherent power to make the change prospectively. Durham v. United States, 94 U.S.App. D.C. 228, 240, 214 F. 2d 862, 874 (1954).

have abused their broad discretionary powers.[20] Promulgation of similar standards is appropriate to regulate the discretion of the lower courts to impose consecutive sentences, a non-statutory authority which has been characterized as an inherent power of the court.[21]

This Court should prohibit consecutive sentences for offenses arising out of a single course of conduct unless the sentencing judge makes the following two findings to justify the imposition of a sentence exceeding the maximum available for the most serious offense:

(1) Based on an examination of the facts, the court should be required to find that the course of conduct was not motivated by a single intent and objective. Drawing on the experience in California, Illinois and other jurisdictions, this inquiry would focus not on the statutory definitions of the crimes but on the specific facts and the intent and objective which can be inferred from those facts.

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20/ Coleman v. United States, 123 U.S.App.D.C. 103, 357 F. 2d 563 (1965); Leach v. United States, 118 U.S.App. D.C. 197, 334 F. 2d 945 (1964). See Note, Appellate Review of Sentencing Procedure, 74 Yale L. J. 379 (1964).

21/ E.g., Hill v. United States, 306 F. 2d 245, 247 (9th Cir. 1962).

(2) The court should be required to find that a sentence in excess of the maximum available for the most serious offense is necessary to achieve recognized sentencing goals. It is clear, of course, that judges differ in their assessment as to the relative priority to be assigned to deterrence, retribution, protection of society, and rehabilitation -- the principal criteria customarily followed in the setting of sentences.[22/] This proposal would require only that the sentencing judge explain his reasons for believing that a sentence in excess of the maximum available for the most serious offense is necessary to achieve one or more of these goals.

The proposed rule not only avoids the limitations of the same evidence and lenity rules but also encourages a discriminating judicial approach to this difficult sentencing problem. There are three principal considerations which make it desirable for the courts to limit their power to impose consecutive sentences for multiple offenses arising out of a single course of criminal conduct: (1) the power to cumulate sentences is productive of sentencing disparities; (2) the power to cumulate

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22/ For the conflict between these rules, see Comment, Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study, 69 Yale L. J. 1453 (1960), and sources cited in note 23 infra.

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sentences is productive of excessive sentences; and (3) the power to cumulate sentences lends itself to judicial encroachment on the executive function of parole. Each of these abuses, which are undoubtedly familiar subjects of concern to this Court, will be briefly described.

(1) The "disparity problem" in sentencing has been widely noted. It has prompted a strong movement for the institution of appellate review of sentences in the Federal system.[23/] In recently urging appellate review of sentences, the Advisory Committee on Sentencing and Review of the American Bar Association Project on Minimum Standards for Criminal Justice provides examples and

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23/ See, generally, the following: American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Appellate Review of Sentences (Tentative Draft, 1967) (hereinafter cited as ABA Standards Relating to Appellate Review of Sentences); Appellate Review of Sentences, Hearings on S. 2722 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 89th Cong., 2d Sess. (1966); Note, Appellate Review of Sentencing Procedure, 74 Yale L. J. 379 (1964); and Appellate Review of Sentences, a Symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit, 32 F.R.D. 249 (1962).

Note

sources to illustrate "the clearly demonstrable fact that similarly situated defendants often receive grossly disparate sentences."[24] The Advisory Council of Judges of the National Council on Crime and Delinquency has likewise called attention to the fact that "a universal criticism of sentencing is the disparity of sentences imposed, the variations being accounted for by factors other than the character of the defendant and the needs of rehabilitative treatment." Advisory Council of Judges, Model Sentencing Act -- Text and Commentary, 9 Crime & Delinquency 339, 346 (1963). Although the data are limited, there is ample indication that disparity in sentencing practices exists in the District of Columbia.[25]

Disparities in the sentences meted out to similar offenders who have engaged in similar criminal conduct are shocking to the sense of justice and suggest a denial of the equal protection of the laws.[26] Furthermore, it

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24/ ABA Standards Relating to Appellate Review of Sentences 27.

25/ Report of the President's Commission on Crime in the District of Columbia 386-89 (1966).

26/ Compare United States v. Wiley, 278 F. 2d 500 (7th Cir. 1960) (unjustified disparity in sentencing of co-defendants was abuse of discretion).

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is generally recognized that the rehabilitation process can be adversely affected if the offender believes that his sentence is the unjust product of one judge's arbitrary urge to punish.[27/] Some sentencing disparity will undoubtedly always persist as an inevitable by-product of the effort to "individualize justice" by according to judges the discretion to fix particular sentences within certain limits.[28/] But the aim of the criminal law should be to reduce sentencing disparity to the minimum consistent with the existence of the sentencing discretion that is necessary to achieve effective individualization of justice. If the unbridled discretion to cumulate sentences for offenses committed in a single course of criminal conduct is not necessary to the individualization of justice, then that discretion ought to be forsworn by the courts in the interest of reducing disparity. Thus the Model Sentencing Act embodies various features designed to rationalize sentencing, among them the provision of Section 22 that

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27/ ABA Standards Relating to Appellate Review of Sentences 25-26; see authorities cited in Note, 69 Yale L. J. 1453, 1459 nn. 28 & 29 (1960).

28/ See Rubin, Disparity and Equality of Sentences - A Constitutional Challenge, 40 F.R.D. 55, 59 (1966).

"separate sentences of commitment imposed on a defendant for two or more crimes constituting a single criminal episode shall run concurrently."[29]

(2) If the District of Columbia struggled under the limitations of a system of justice which provided inadequate punishment for the offenses which it defined as criminal, then it might well be that the judiciary should claim the unrestricted power to cumulate sentences in particular cases. In such a hypothetical system the need to individualize justice through imposition of consecutive sentences in appropriate cases might outweigh the evil of sentencing disparities which the discretion to cumulate necessarily produces. But it cannot be seriously urged that the penalty provisions of the criminal law in this jurisdiction are, without cumulation, generally inadequate to achieve the aims of the criminal law.[30]

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29/ Advisory Council of Judges, Model Sentencing Act -- Text and Commentary, 9 Crime & Delinquency 339, 368 (1963).

30/ See the data regarding sentence length and time served for serious offenses in the District set forth in Report of the President's Commission on Crime in the District of Columbia 383 (1966).

The most that can be said is that in certain extraordinary cases the multiple aims of the criminal law can be achieved only by imposition of consecutive sentences whose total minima or maxima exceed the minimum or maximum sentences permitted for any one of the offenses involved. Because of this possibility, we have not urged adoption of a totally inflexible rule against consecutive sentencing; instead we have proposed a rule which would in general prohibit consecutive sentencing for offenses arising out of a single course of conduct, but which would, in extraordinary cases, permit such sentences on appropriate findings subject to appellate review. To deny the propriety of such a rule is to assert that cumulative punishment should be the norm rather than the exception, and that the problem of excessive sentences created by the discretion to cumulate punishments is not so serious as to warrant imposition on the trial court of the additional burden of making findings whenever the power to cumulate is exercised. Neither of these propositions can withstand the most cursory analysis.

But the present law (or lack of it) as to consecutive sentencing is even more deficient than the foregoing observations suggest: the same evidence rule not only

fails to control judicial discretion in sentencing but affirmatively misguides the exercise of that discretion. The appropriate disposition of a criminal offender obviously does not depend solely, or even primarily, on the number of legal offenses to which his criminal conduct has given rise: the basic philosophy of the widely adopted indeterminate sentence statutes is entirely at war with the idea that punishment is simply a function of the legal offense involved.[31/] Yet it is precisely the function of the same evidence rule of consecutive punishment to make the duration of incarceration dependent upon the number of legal offenses committed, rather than upon the character of the offender and the nature of his criminal conduct.

(3) Finally, the power to cumulate sentences naturally lends itself to judicial intrusion into the area of responsibility assigned to parole boards. The dangers which excessive minimum sentences pose to rehabilitation and

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31/ See Hart, The Aims of the Criminal Law, 23 Law & Contemp. Prob. 401, 426-27 (1958); Advisory Council of Judges, Model Sentencing Act -- Text and Commentary, 9 Crime & Delinquency 339, 346 (1963).

parole flexibility have been frequently noted:

> "One of the truly destructive elements in present-day sentencing practice is the imposition of minimum terms, especially those which, at the discretion of the sentencing judge, may (in some states) be inordinately high. It must be recognized that a high minimum term limits parole flexibility and handicaps the entire correctional process. Parole boards need the power to release the offender when his adjustment seems to them to warrant it." Turnbladh, A Critique of the Model Penal Code Sentencing Proposals, 23 Law & Contemp. Prob. 544, 548 (1958).

In the interest of allowing the parole board to do its job, the Model Sentencing Act does not authorize any minimum terms.[32/]

Professor Hart suggests that there is "serious danger" in permitting the protection of society by disabling offenders to be a criterion in the judge's exercise of general sentencing discretion:

> "The existence of a special need for disablement of particularly dangerous individuals seems better taken into account either (1) by parole authorities, in the light of prison experience, in deciding whether to release a prisoner before his maximum term has expired; or (2) through statutory provisions for extended terms laying down carefully-stated criteria to be applied by the judge on the basis of special findings of fact." Hart, The Aims of the Criminal Law, 23 Law & Contemp. Prob. 411, 437 n. 80 (1958).

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32/ Advisory Council of Judges, Model Sentencing Act -- Text and Commentary, 9 Crime & Delinquency 339, 347 (1963).

Professor Hart concludes that the judge ought to have the power to fix a minimum term, "although the power should be used with caution, since its exercise will deprive the prisoner of an opportunity by his behavior in prison to justify an earlier parole." Id. at 439. The rule proposed in this brief would advance this goal by restricting the judge's discretion to impose a minimum sentence greater than that authorized under the District's sentencing laws for the most serious offense unless he makes specific findings to justify the imposition of a longer minimum term.

For these reasons it is recommended that the judgment denying appellant's motion for relief be set aside and the case be remanded for resentencing in accord with the criteria set forth above.

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The only really [illegible] argument ? the new - disparity. [illegible]. parole - is [illegible].

## II. Guilty Plea Negotiations and Dispositions

The significance of the legal issue previously discussed is highlighted by the fact that appellant received his consecutive sentences after conviction by plea rather than by trial. The disposition of the charges against appellant exposes some profound problems related to plea bargaining in the District of Columbia, particularly in cases where charging by prosecutors of multiple offenses arising from a single course of conduct is practiced so as to induce defendants to enter a plea of guilty to some of the charges. Although these specific issues have not been previously presented to this Court, their immediacy and importance warrant the Court's attention. Analysis of these issues may not only assist in making a fair disposition of appellant's contentions but also provide appropriate guidelines for the future processing of guilty pleas in this jurisdiction.

As is the case generally throughout the United States, guilty pleas in the District of Columbia are an important factor in the administration of criminal

justice.[33] It has been estimated recently that guilty pleas account for 90% of all convictions in the United States, and perhaps as high as 95% of misdemeanor convictions.[34] In the District of Columbia over the past 15 years, the number of pleas of guilty in felony cases has remained fairly constant, always exceeding 50% of the criminal dispositions.[35] A substantial percentage of guilty pleas are the product of negotiation between the prosecutor and defense counsel or the accused.[36] Discussions relating to pleas of guilty may take a variety of forms, but the three most prevalent are pleas in return for a sentence recommendation, pleas to a lesser

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33/ See, generally, Newman, Conviction - The Determination of Guilt or Innocence Without Trial (1966); American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Pleas of Guilty (Tentative Draft, 1967) (hereinafter cited as ABA Standards Relating to Pleas of Guilty); Note, Guilty Plea Bargaining - Compromise by Prosecutors to Secure Guilty Pleas, 112 U. Pa. L. Rev. 865 (1964).

34/ Task Force on Administration of Justice, President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 9 (1967) (hereinafter cited as Commission Task Force Report).

35/ Report of the President's Commission on Crime in the District of Columbia 243 (1966).

36/ Although exact figures are not available, the percentage is clearly high. See Note, 112 U. Pa. L. Rev. 865, 896-99 (1964).

included offense, and pleas in return for the dismissal of pending charges.[37]

The plea bargaining practice most common in the District of Columbia is that reflected in this case, since prosecutors in the District do not typically make recommendations to the court with regard to sentencing dispositions. In return for the promised dismissal of six counts of the indictment, appellant pleaded guilty to the most serious offenses charged -- housebreaking and robbery. The record does not reveal whether any discussions took place between appellant's counsel and the prosecutor or judge with regard to any possible sentencing disposition. Yet it is clear that appellant was motivated, in important measure, by the expectation that he would receive a more lenient sentence after pleading guilty than might result if he were convicted after trial. Four days after the plea was entered, the judge imposed a maximum sentence of 20 years. Since it exceeded by five years the statutory maximum for both housebreaking and robbery, this sentence could be achieved only by cumulating the sentences given on the individual charges of housebreaking and robbery. Although appellant's

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37/ Id. at 866.

expectations of comparative leniency appear to have been well founded in light of actual District practice,[38] they were shattered by the severity of his sentence.[39] The sentencing judge offered no explanation for his sentence except to say that the defendant had committed a "very serious offense" and that the judge therefore had to "pass a very serious sentence." Appellant has now served nine years of his sentence.

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38/ In 1964-65, 53.4% of those convicted after a jury trial were sentenced to 5 or more years imprisonment, whereas only 20.9% of those who pleaded guilty to the offenses charged were so sentenced. Report of the President's Commission on Crime in the District of Columbia 384 (1966). A similar pattern is reported to exist in the 1950-1965 period. Id. at 384-85.

39/ Notwithstanding the suggestion made by the Government that appellant might have received a total sentence of 74 years after trial, it seems hard to deny that the sentence was severe. Analysis of the sentences imposed in the District Court in 1960 (the closest year for which detailed data are available) indicates that 84% of robbery offenders received probation or a maximum prison term of 10 years or less and 83% of all burglary offenders received probation or a maximum prison term of 5 years or less. The figures for 1960 also show that only 1.5% of all defendents convicted in the District Court received maximum prison terms of 15 years or more.

Notwithstanding the pervasiveness of plea bargaining, the courts have not yet developed legal rules which openly confront the practice and its potential abuses and injustices. The system of plea bargaining in the District of Columbia, in effect, invites charged defendants to enter a plea of guilty in return for dismissal of other charges and leniency in sentence, relies on the acceptance of such an arrangement by a substantial percentage of all felony defendants in order to manage its caseload, disclaims any official knowledge of or responsibility for these arrangements, and refuses to review the sentencing disposition which is the end result. Some of these specific problems are reflected in appellant's case.

A. Understanding of the Consequences of a Plea of Guilty.

Rule 11 of the Federal Rules of Criminal Procedure sets forth the requirements which must be followed in the acceptance of pleas of guilty.[40/] At the time that

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40/ Rule 11 embodies the general prescriptions relating to pleas of guilty set down by the Supreme Court in Kercheval v. United States, 247 U.S. 220, 223-24 (1927):

> "A plea of guilty differs in purpose and effect from a mere admission or an extra-judicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not

(cont.)

appellant entered his plea, the second sentence of Rule 11 provided: "The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge." As amended in 1966, the same sentence now reads as follows:

> "The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea."

According to the Notes of the Advisory Committee, the addition of the words "and the consequences of the pleas" was intended "to state what clearly is the law."[41]

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40/ (cont.)

> required; the court has nothing to do but give judgment and sentence. Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences. When one so pleads he may be held bound. United States v. Bayaud, 23 Fed. 721. But, on timely application, the court will vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear or inadvertence."

41/ Notes of Advisory Committee on Rules, 39 F.R.D. 171 (1966).

Even before the 1966 amendment, this Court in Edwards v. United States, 103 U.S.App.D.C. 152, 155, 256 F.2d 707, 710 (1958), had interpreted the rule to mean that the court must take steps to satisfy itself that the defendant understood "the meaning of the charge, and what acts amount to being guilty of the charge, and the consequences of pleading guilty thereto." Moreover, the practice commonly followed in the District Court requires that the judge make appropriate inquiry to determine, among other facts, that the defendant "has an understanding of the consequences of entering the plea of guilty."[42] Although there

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42/ By resolution of the judges of the United States District Court for the District of Columbia promulgated June 24, 1959, the trial judges expressed their consensus that defendants seeking to enter a plea of guilty should be interrogated by or under the direction of the court in order to establish the following facts:

"1. That defendant has been advised and understands that he has a right to a speedy trial by jury with the aid of counsel, but will have no such right if his plea of guilty is accepted.
2. That he will have the assistance of counsel at the time of sentence if the plea is accepted.
3. That defendant understands the nature of the charges against him which should be stated to him in brief by the Court notwithstanding a prior reading of the indictment.
4. That defendant did in fact commit the particular acts which constitute the elements of the crime or crimes charged.

(cont.)

is a division of authority on whether understanding the consequences of a plea includes knowledge of the range of possible punishment,[43] the more desirable rule requires that the defendant be so informed.

This issue was considered in Carter v. United States, 113 U.S.App.D.C. 123, 306 F.2d 283 (1962), where the defendant contended that he had not understood at the time of plea that he could be sentenced under the Federal Youth Corrections Act for a longer period than the one-year maximum provided for the misdemeanor charge. Although

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42/ (cont.)

5. That the guilty plea has not been induced by any promise or representation by anyone as to what sentence will be imposed by the Court.
6. That he has not been threatened or coerced by anyone into making the guilty plea.
7. That no promises of any kind have been made to him to induce the guilty plea.
8. That he has an understanding of the consequences of entering the plea of guilty.
9. That he is entering the plea voluntarily and of his own free will because he is guilty and for no other reason.
10. That he has discussed the entry of his plea of guilty fully with his attorney.

It is further resolved, that it is the consensus of opinion of the Judges of this Court that [a] plea of guilty shall be accepted only when the Court is satisfied that he is guilty and that he is entering the plea voluntarily and of his own free will, and with an understanding of his rights, of the charges against him and the consequences of entering the plea."

Everett v. United States, 119 U.S.App.D.C. 90, 91, 336 F. 2d 979, 980 n.3 (1964)

43/ See sources cited in Note, 112 U. Pa. L. Rev. 865, 874, n.48 (1964).

the record did not disclose that the defendant in fact relied on the trial court's explanation of the potential one-year duration of a misdemeanor sentence, this Court concluded that the defendant should have the opportunity to move to withdraw his plea. A similar result was reached in Pilkington v. United States, 315 F. 2d 204 (4th Cir. 1963), where the defendant alleged that he had been advised by the judge that the maximum penalty for his offense was five years but that he was sentenced under the Federal Youth Corrections Act to a possible maximum of six years. The Court held that the defendant was entitled to a hearing on the question of voluntariness, which could appropriately be raised in a proceeding under Section 2255. Id. at 207. The Court stated:

> "It should be made clear that we do not now decide that the petitioner is entitled to relief under 28 U.S.C.A. § 2255. Whether or not the guilty plea was made voluntarily and understandingly is a question of fact to be determined after an inquiry. A hearing may disclose that Pilkington, before pleading guilty, was actually aware of the possible penalties under the Federal Youth Corrections Act, having been informed by his attorney or by the probation officer with whom he conferred prior to trial, or by someone else. At such hearing many other relevant circumstances may be adduced. We decide no more than that a sufficient showing has been made to call for a hearing." Id. at 209.

According to the court, Rule 11 "cannot be interpreted to mean that anything less will suffice than a complete

understanding of the possible sentence."[44]

Appraised against the standards set forth in Rule 11 and these decisions, appellant may not have been properly informed of the consequences of his plea. He was not expressly advised by the court of the possible maximum sentence which could be imposed. Advice of this nature is particularly necessary when pleas are entered to more than one count of an indictment, since the possibility of consecutive sentences may be of critical importance to the defendant. Explicit information on this subject should be provided by the court regardless of whether the defendant's counsel had discussed the matter with him.[45] Thus, the ABA Advisory Committee on the

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44/ 315 F. 2d at 210. The decisions in Carter and Pilkington have been generally followed. See, e.g., Chapin v. United States, 341 F. 2d 900 (10th Cir. 1965); Kotz v. United States, 353 F. 2d 312 (8th Cir. 1965); contra Marvel v. United States, 335 F. 2d 101 (5th Cir. 1964).

45/ This serves to eliminate the grounds for a subsequent contention that the defendant's attorney did not tell him what the maximum might be. See Kotz v. United States, 353 F. 2d 312 (8th Cir. 1965).

Criminal Trial in its proposed standards relating to pleas of guilty has recommended that pleas not be accepted before the judge informs the defendant "of the maximum possible sentence on the charge, including that possible from consecutive sentences."[46] The Committee pertinently observes that its proposal would give "the defendant a more realistic picture of what might happen to him...."[47] Appellant was denied this additional precaution and, under the Carter and Pilkington cases, this matter should be remanded for a hearing as to whether his plea was entered in accord with the requirements of Rule 11. Even if this Court concludes that this disposition is not appropriate in appellant's case, an explicit requirement to this effect for the benefit of other defendants would give added substance to Rule 11's requirement that defendants entering pleas of guilty fully understand the consequences of their act.

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46/ ABA Standards Relating to Pleas of Guilty 25. One commentator has gone further and suggested that the judge should inform the defendant of his sentencing practices, especially those with regard to concurrent or consecutive sentences for offenses arising out of a single transaction. Note, 112 U. Pa. L. Rev. 865, 893 (1964).

47/ ABA Standards Relating to Pleas of Guilty 28.

B. Judicial Responsibility for Pleas of Guilty

The overriding plea bargaining problem reflected in this case is the absence of effective procedures through which the courts can exercise their responsibility for plea discussions, arrangements and dispositions. Notwithstanding the improved formal procedures now followed in the District Court, this problem remains an urgent and important one.

The difficulties stem in large part from the tension between the facts of plea bargaining and the legal rules which have developed under Rule 11 to test the understanding and voluntariness with which pleas of guilty are entered. At the time that the trial judge makes the formal inquiries of the defendant regarding his understanding of the plea and the voluntariness of his act, the defendant is under considerable pressure not to disclose any of the relevant considerations which have influenced his decision to enter a plea of guilty. As has been pointed out,

> "[t]he plea proceeding is basically non-adversary; the prosecutor is attempting to have the case disposed of by plea and the defendant is trying to have his plea accepted. At this point in time the interests of the parties merge. This complicates the court's obligation to determine

whether the plea is voluntarily and understandingly made." 48/

The Task Force of the President's Commission on Law Enforcement and Administration of Justice recently stated:

> "Moreover, it is essential to the successful working of the system that the judge accept the arrangements worked out between defense counsel and the prosecutor. Because of doubts over the legality of the negotiated plea, prosecutors and defense counsel typically avoid all reference in court to the sentence to be imposed until after the plea has been tendered and accepted, and engage in the pious fraud of making a record that the plea was not induced by any promises. Since the judge's sentence remains to be pronounced, the defendant does not achieve the control he sought in negotiating unless he has confidence that the judge will accept the arrangement. The defendant is interested in controlling the exercise of sentencing discretion, not in a lawsuit over a motion to withdraw his guilty plea because of disappointment over the sentence later imposed. The typical unreviewability of the exercise of sentencing discretion only sharpens the point." Commission Task Force Report 111.

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48/ Note, 112 U. Pa. L Rev. 865, 886 (1964). The same point has been made in more picturesque terms: "If the judge, the prosecution, or the defense counsel makes a statement in open court that is contrary to what he has been led to believe, especially as to promises by the prosecutor or his defense counsel,... [the defendant] would no more challenge that statement in open court than he would challenge a clergyman's sermon from the pulpit." Trebach, The Rationing of Justice 159-60 (1964), quoted in ABA Standards Relating to Pleas of Guilty 61.

These observations are fully applicable to the District of Columbia.[49/]

Because the traditional procedures fail so radically to reflect the underlying facts, the courts have had great difficulties in grappling with the subtle realities of the plea bargaining process.[50/] Cases involving allegations of promises or assurances from the prosecutor, court or defense counsel regarding sentencing or other concessions have left important questions unresolved. It is not clear, for example, whether the prosecutor's promise to dismiss other charges or make other con-

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49/ Although the more detailed inquiry suggested by the 1959 resolution of the judges of the District Court, supra note 42, marks a substantial improvement over the inquiry made in appellant's case, it is still subject to this fundamental criticism. See also the statement of this Court in Everett v. United States, 119 U.S.App.D.C. 60, 62, 336 F. 2d 979, 981 (1964):

> "The District Judge interrogated appellant carefully as to his awareness of the possible sentence; appellant reiterated his guilt and said he was pleading guilty because he was guilty and not because the Government had moved to dismiss four other counts should he plead guilty to Counts 3 and 4."

50/ The extreme cases, involving allegations of coercion by the threats of a law enforcement officer, have been readily resolved by permitting the withdrawal of the guilty plea. Waley v. Johnston, 316 U.S. 101 (1942). See also Herman v. Claudy, 350 U.S. 116 (1956) (remanded for a hearing where defendant alleged that his pleas resulted from coercion and he was never advised of his right to counsel or given the benefit of counsel).

cessions in return for the defendant's plea renders the plea involuntary, regardless of whether the promises are in fact fulfilled.[51] There is some judicial support for the proposition that any such arrangement will be grounds for invalidating the plea of guilty. This is certainly a reasonable reading of the extensive but inconclusive exploration of the issue in Shelton v. United States, 242 F. 2d 101 (5th Cir.), rev'd, 246 F. 2d 571 (5th Cir. 1957) (en banc), rev'd per curiam on confession of error, 356 U.S. 26 (1958). Confronted with allegations that the defendant was induced to plead guilty by promises made by the prosecutor, some relating to dismissal of pending charges, the Supreme Court without discussion remanded for a hearing in reliance upon the "confession of error by the Solicitor General that the plea of guilty may have been improperly obtained."[52] A different

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51/ The cases on the issue of voluntariness are discussed in Note, 112 U. Pa. L. Rev. 865, 871-73 (1964); Note, Official Inducements to Plead Guilty: Suggested Morals for a Marketplace, 32 U. Chi. L. Rev. 167, 174-78 (1964).

52/ 356 U.S. 26 (1958). See also United States v. Lester, 247 F. 2d 496 (2d Cir. 1957), where a remand was ordered in view of defendant's allegations that, in return for his plea of guilty, two other charges would be dismissed and he "would get full consideration from the Court" if he pleaded guilty. Id. at 498-99. In Martin v. United States, 256 F. 2d 345

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standard is suggested by the more recent decision of the Second Circuit in Cortez v. United States, 337 F. 2d 699 (9th Cir. 1964), cert. den. 381 U.S. 953 (1965), where the court held that a plea of guilty was voluntarily entered notwithstanding allegations that the defendant entered his plea in exchange for his wife being allowed to plead guilty to a lesser tax charge. The court stated:

> "We take judicial notice of the fact that the vast majority of those who are indicted for federal crimes plead guilty. We know, too, that in many of the cases where this occurs the plea will be to one count, or less than all counts, of a multicount indictment, or to a lesser offense than that originally charged. In a sense, it can be said that most guilty pleas are the result of a 'bargain' with the prosecutor. But this, standing alone, does not vitiate such pleas. A guilty defendant must always weigh the possibility of his conviction on all counts, and the possibility of his getting the maximum sentence, against the possibility that he can plead to fewer, or lesser, offenses, and perhaps receive a lighter sentence. The latter possibility exists if he pleads guilty, as Cortez did, to the whole charge against him."

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52/ (cont.)

(5th Cir. 1958), the Fifth Circuit concluded that the Supreme Court's reversal of the Shelton case did not invalidate all pleas of guilty entered in reliance on prosecutorial promises. Where the prosecutor has induced a plea by promises not intended to be kept, however, the courts have held that the plea of guilty would be considered involuntary. See, e.g., Dillon v. United States, 307 F. 2d 445 (9th Cir. 1962) (representation by prosecutor as to a sentencing recommendation to be made "if asked" might under the circumstances be illusory and therefore an improper inducement).

> "The important thing is not that there shall be no 'deal' or 'bargain', but that the plea shall be a genuine one, by a defendant who is guilty; one who understands his situation, his rights, and the consequences of the plea, and is neither deceived nor coerced." Id. at 701.

The decisions of the Supreme Court since the Shelton litigation have not assisted in clarifying the legal status of guilty pleas entered in exchange for dismissal of pending charges or other prosecutorial concessions.[53/]

The decisions of this Court have not squarely faced these issues. This Court has held that erroneous or optimistic representations by defense counsel regarding the probable sentence are insufficient grounds on which to

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53/ In Machibroda v. United States, 368 U.S. 487 (1962), the Supreme Court held that the petitioner should have been granted a hearing on his allegations that his plea of guilty had been induced by representations of the prosecutor as to the length of sentences that would be imposed. The petitioner also alleged that the prosecutor had threatened him regarding the disposition of other criminal matters. According to the Court, such allegations, if true, would require the vacation of the guilty plea on the grounds that it had been deprived of the character of a voluntary act. Id. at 493. See also Nagelberg v. United States, 377 U.S. 266 (1966), where the Government admitted to the Court that the lower court may have been misled in denying petitioner's motion to withdraw his guilty plea because the Government had not informed the court of its intention to substitute lesser charges in return for petitioner's cooperation with the Government.

justify withdrawal of a plea of guilty.[54] In Watts v. United States, 107 U.S.App.D.C. 367, 278 F. 2d 247 (1960), the Court held that defendant was not entitled to withdraw his plea because the police allegedly used his confederate's confession as a means of inducing defendant's confession and plea. This Court summarized the law as follows:

> "It is true, of course, that a sentence rendered upon a truly coerced plea of guilty is subject to collateral attack through habeas corpus, and would also be amenable to proceedings under Sec. 2255. So, too, are guilty pleas obtained through promises of leniency by the prosecution, or those entered by the accused without knowledge of his rights. In these cases, however, the plea is involuntary since it represents a 'choice' made under threat of force, or by improper inducements, or through ignorance of his rights. Such action by an accused is, in reality, no choice at all. Of overriding importance is that in such cases the plea suffers the defect of inherent untrustworthiness." Id. at 369, 278 F. 2d at 249.

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54/ E.g., Everett v. United States, 119 U.S.App.D.C. 60, 336 F. 2d 979 (1964); Smith v. United States, 116 U.S.App.D.C. 404, 324 F. 2d 436 (1963); Moore v. United States, 101 U.S.App.D.C. 412, 249 F. 2d 504 (1957). The Court has also generally required that a defendant seeking to withdraw his plea must allege that he is not guilty. Smith v. United States, supra at 440-41; see also McCoy v. United States, __ U.S. App.D.C. __, 363 F. 2d 306 (1966), where the court refused to permit the entry of a plea to a lesser charge in the midst of trial because defendant told the court that he was not guilty.

No cases, however, have squarely put the question whether a plea entered in return for the dismissal of pending charges would affect the voluntariness of the plea.[55]

Because plea negotiation "remains largely invisible, informal, and not subject to any systematic control,[56] concern with its potential abuses has recently prompted much criticism and accompanying proposals for reform. Recognizing that plea negotiations may serve many legitimate and important goals, the Commission Task Force emphasized the serious problems inherent in the system -- the possibility that innocent defendants may be persuaded to plead guilty, the manipulation of the process by experienced offenders, and the bewilderment and sense of injustice among defendants which result from the wide variation in practices among prosecutors and trial judges.[57]

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55/ One of the few cases where a hearing has been ordered on the issue of withdrawal is Hawk v. United States, 119 U.S.App.D.C. 267, 340 F.2d 792 (1964). In addition to allegations of perjured testimony by the complaining witness, however, there were procedural dificiencies which persuaded the court that remand was appropriate.

56/ ABA Standards Relating to Pleas of Guilty 61

57/ Commission Task Force Report 11-12.

By encouraging deliberate and unwarranted overcharging, the plea bargaining process magnifies the central role of prosecutorial discretion in our system and the near absence of judicial scrutiny over the exercise of this discretion.[58] The Report concludes that "those courts that continue to use a negotiated plea system must take vigorous steps to reduce these potential abuses."[59]

Any effort to reform plea negotiations in the District of Columbia should begin with a commitment to increase the visibility of the entire process. Recommendations made by the ABA Advisory Committee on the Criminal Trial, for example, urge that, prior to accepting a plea of guilty, the court should determine whether the tendered

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58/ It is generally recognized that overcharging for the purposes of improving the prosecutor's bargaining position does take place. Id. at 12; Mills, The Prosecutor: Charging and "Bargaining", 1966 U. Ill. L. F. 511, 518; Note, 112 U. Pa. L. Rev. 865, 886 (1964). It has been reported that District prosecutors view the panel opinion of this court as a "crippling blow" to plea bargaining because defendants will not bargain without "the threat of consecutive sentences." The Washington Post, June 15, 1967, p. C2. For some critical judicial comment on multiple charging see the concurring opinion of Mr. Justice Brennan in United States v. Ewell, 383 U.S. 116, 125-26 (1966). In a similar context, the exercise of prosecutorial discretion has raised serious equal protection questions. Hutcherson v. United States, 120 U.S.App.D.C. 274, 345 F. 2d 964 (1965), cert. den., 382 U.S. 894

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plea is the result of prior plea discussions and a plea agreement, and, if so, what agreement has been reached. ABA Standards Relating to Pleas of Guilty 8. This requirement "is based upon the assumption that it is preferable for the in-court inquiry to give visibility to the plea discussions-plea agreement process" and "will disclose whether there is reason for the court to caution the defendant of the court's independence from the prosecutor." Id. at 29-30. The Report of the Commission Task Force agrees that the negotiations "should be freed from their present irregular status so that the participants can frankly acknowledge the negotaitions and their agreement can be reviewed by the judge and made a matter of record. Commission Task Force Report 12.

A second major change in plea procedures -- and one expressly raised by appellant's case -- relates to acceptance of increased responsibility by the courts. Such

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58/ (cont.)

(1965) (separate opinion of Chief Judge Bazelon). To improve the exercise of prosecutorial discretion in the District, it has been recommended that the United States Attorney formulate policy guidelines for his staff and require the regular recordation and review of the reasons underlying critical prosecutorial decisions. Report of the President's Commission on Crime in the District of Columbia 333 (1966).

59/ Commission Task Force Report 12.

an enlarged role for the trial judge might involve him in the pre-plea discussions, although it is generally agreed that "the judge should not become an active participant in the discussions leading to a plea agreement." Commission Task Force Report 12 n. 28. Most importantly, this responsibility requires procedures which assure that a defendant who enters a plea of guilty relying on the expectations of the implied promises of leniency should receive the benefit of his bargain. The desirability of this goal is reflected in the recommendations of the Commission's Task Force and the ABA Advisory Committee. Id. at 12.

Notwithstanding the debate whether judges can appropriately impose more lenient sentences because the defendants have entered pleas of guilty, "it appears that most judges consider such leniency proper if the sentence disparity is not unreasonable." 60/ It is precisely the

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60/ ABA Standards Relating to Pleas of Guilty 37-38. For a contrary view see Note, 32 U. Chi. L. Rev. 167, 184 n. 63 (1964); see also Comment, The Influence of the Defendant's Plea on Judicial Determination of Sentence, 66 Yale L. J. 204 (1956).

expectation of such sentencing leniency, in fact, which induces most defendants to enter a plea of guilty. As pointed out by the ABA Advisory Committee on the Criminal Trial:

> "It is apparent that a plea discussion-plea agreement system cannot operate effectively unless trial judges in fact grant charge and sentence concessions to most defendants who enter a plea of guilty or nolo contendere. It does not follow, however, that the trial judge should perfunctorily or routinely grant all concessions sought by the prosecutor. Nor does it follow that every defendant who decides not to demand trial should receive concessions." ABA Standards Relating to Pleas of Guilty 38.

Although the expectations of the defendant are "almost invariably satisfied",[61] no procedures have been developed to insure that this, in fact, is the case. One approach would provide that at the time he imposes sentence, the trial judge may grant sentence concessions to defendants who plead guilty "when the interest of the public in the effective administration of criminal justice would thereby be served."[62] The recommendations of the Commission

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61/ Enker, Perspectives on Plea Bargaining, Commission Task Force Report 111 (1967)

62/ The proposed standard sets forth these specific considerations as relevant to the court's decision: "(i) that the defendant by his plea has aided in ensuring the prompt and certain application of correctional measures to him; (ii) that the defendant has acknowledged his guilt and shown

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Task Force suggest that the judge should not accept a plea of guilty until such time as he has been able to weigh the facts developed by a pre-sentence investigation so as to be able to conclude whether an appropriate sentence may be given which reflects appropriate consideration of the entry of a plea of guilty. If the judge considers, after such investigation, that a more severe sentence should be imposed, the defendant should be permitted to withdraw his pleas. Commission Task Force Report 13.

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62/ (cont.)

a willingness to assume responsibility for his conduct; (iii) that the concessions will make possible alternative correctional measures which are better adapted to achieving rehabilitative, protective, deterrent or other purposes of correctional treatment, or will prevent undue harm to the defendant from the form of conviction; (iv) that the defendant has made public trial unnecessary when there are good reasons for not having the case dealt with in a public trial; (v) that the defendant has given or offered cooperation when such cooperation has resulted or may result in the successful prosecution of other offenders engaged in equally serious or more serious criminal conduct; (vi) that the defendant by his plea has aided in avoiding delay (including delay due to crowded dockets) in the disposition of other cases and thereby has increased the probability of prompt and certain application of correctional measures to other offenders." ABA Standards Relating to Pleas of Guilty 36-37.

## CONCLUSION

The disposition of appellant's case cannot be dissociated from the important and difficult questions associated with plea negotiations and sentencing discretion in the District of Columbia. The lack of effective judicial controls over the plea bargaining process and the attendant abuses support the desirability of adopting the rule advanced relating to the imposition of consecutive sentences for multiple offenses arising out of a single course of conduct. At the very least, this limitation on consecutive sentences in one category of cases would operate as a desirable restraint on the prosecutor's broad discretionary powers to file multiple charges as a lever to induce needed pleas of guilty. Apart from any such specific rule, however, the operation of the system in appellant's case raises troublesome issues as to the voluntariness of his plea and the inherent fairness of the procedures followed in the disposition of his case. It is clear that "[t]he fairness and adequacy of the procedures on acceptance of pleas of guilty are of vital importance in according equal justice to all in the federal courts."[63/] The pertinent question for

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63/ Notes of Advisory Committee on Rules, 39 F.R.D. 171 (1966).

this Court is whether the manifest injustice reflected in this case can be permitted in a system which aspires to the rational and just administration of the criminal law.

Respectfully submitted,

Howard P. Willens
900 - 17th Street, N. W.
Washington, D. C. 20006

APPENDIX A

Filed Sept. 8, 1958
Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES

v.

ROY J. IRBY,
Defendant.

CRIMINAL NO. 410-58

Washington, D. C.
July 21, 1958

The above-matter came on for hearing before Judge James W. Morris, at approximately 10:00 A.M., to plead.

FOR THE GOVERNMENT: Frederick G. Smithson, Esq.

FOR THE DEFENDANT: John J. Dwyer, Esq.

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PROCEEDINGS

MR. DWYER: This is not on your calendar, your Honor. The defendant wishes to withdraw his plea of not guilty to Counts one and three of the indictment and plead guilty to those two counts.

Mr. Smithson advised that that is satisfactory to the government. I have discussed the matter with Mr. Irby, who is now present in Court and advised him he is entitled to trial by the jury, and he advises me he wishes this disposition of the matter.

THE COURT: That is, to plead guilty to Counts One and Three?

MR. DWYER: Yes, sir; one, which is housebreaking and three, which is robbery.

Mr. Smithson tells me he will dismiss the other counts at the time of sentencing.

MR. SMITHSON: The other counts are counts which would be included in the others. I think this is adequate disposition and would so recommend.

THE COURT: Do you understand what has been said?

THE DEFENDANT IRBY: Yes.

THE COURT: You are charged in Count One that on or about February 24, 1958 in the District, George W. Foster and Roy J. Irby, that's you--

THE DEFENDANT: Yes, sir.

THE COURT: (Continuing.)--entered the dwelling of David L. Weltman and Claire G. Weltman, with intent to steal the property of another.

Did you do that?

THE DEFENDANT: Yes, sir.

THE COURT: And you want to plead guilty to that offense?

THE DEFENDANT: Yes, sir.

THE COURT: In the Third Count it is charged that on or about February 24, 1958, in the District, George W. Foster and Roy Irby, by force and violence and against resistance and by sudden and stealthy seizure and snatching and by putting in fear, stold and took from the person and from the immediate actual possession of Claire G. Weltman, property of Claire G. Weltman of the value of $2200 consisting of one finger ring of the value of $1400 and one finger ring of the value of $800.

Did you do that?

THE DEFENDANT IRBY: Yes, sir.

THE COURT: Now, do you want to plead guilty to that offense?

THE DEFENDANT IRBY: Yes, sir.

THE COURT: Are you thoroughly satisfied with your representation in this matter?

THE DEFENDANT IRBY: Yes, sir.

THE COURT: And you feel you have been fully advised of your rights?

THE DEFENDANT IRBY: Yes, sir.

THE COURT: Take his plea, Mr. Clerk, to the First and Third Counts.

THE DEPUTY CLERK: Roy J. Irby, in Criminal case No. 410-58 in which you are charged with housebreaking, attempted robbery, assault with a dangerous weapon, carrying a dangerous weapon and robbery, do you wish to withdraw your plea of not guilty heretofore entered and enter a plea of guilty to Count One which is housebreaking, and Count Three, which is robbery?

THE DEFENDANT IRBY: Yes, sir.

THE COURT: All right. Let the matter be referred for pre-sentence investigation.

MR. DWYER: I have a favor to ask in that connection, your Honor.

If the probation report can be ready by Friday would you sentence him at that time? First, he has been in jail since February, and second, I am going on vacation next week and I am anxious to dispose of it before then.

THE COURT: Of course, if the probation report is ready. But I can't give you any assurance on that.

MR. DWYER: I will talk to them if it is all right with you.

THE COURT: It is all right with me.

(Thereupon, the hearing on the above-matter was concluded.)

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REPORTER'S CERTIFICATE

I hereby certify that the foregoing four pages are an official transcript of the proceedings indicated above.

G RUSSELL WALKER